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In the Supreme Court of the United States

No. 762.
(October Term, 1950.)
No. 75.
(October Term, 1951.)

LOUISE McGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
Petitioner,

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP AND R. E. COPMAN, *Respondents.*

PETITIONER'S REPLY BRIEF.

STATEMENT.

(1) Points I to VII, pages 3 to 70 of this brief call attention to the law and facts necessitating the issuance of the writ prayed for in the exercise of sound judicial discretion.

(2) Points VIII to XIV, pages 70 to 109, state the facts and the law establishing that the Acts of Congress of March 3, 189[illegible], February 13, 1925, and Section 1254, Title 28, U. S. C., as to their discretionary features, are void, because said Acts undertake to delegate to this Court the legislative power of Congress to make exceptions to the appellate jurisdiction of this Court in this case, whereas Section 2 of Act III of the Constitution provides that Congress only shall make such exceptions.

(3) Point XV, pages 109 to 126, state the facts and the law applicable thereto, showing that the Acts of Congress making exceptions to the appellate jurisdiction of this Court are authorized only as to controversies mentioned in Section 2 of Article III of the Constitution, and that Congress has no power to except any of the cases, including this, which are prefaced in the Constitution by the word ALL from said appellate jurisdiction.

ARGUMENT.

I.

Respondents and state officers, pursuant to a conspiracy, while acting under color of state law in violation of the United States Constitution and laws, fraudulently made use of legal proceedings to deprive petitioner of her property, thereby violating her alleged federal rights and stating a claim on which relief should have been granted.

The complaint alleges that the conspirators, pursuant to the conspiracy alleged, while acting under color of the Constitution, statutes and laws of the States of Missouri, Kansas and Oklahoma, by fraudulent use of legal proceedings, deprived petitioner of the property and rights secured and guaranteed to her by the constitutional provisions and laws alleged in the complaint, thus authorizing recovery under Section 43, Title 8, U. S. C.

The Appendix hereto attached shows that, in addition to the facts alleged as to the conspirators' liability under Section 43, Title 8, U. S. C., said complaint also alleges facts showing petitioner's right to recover against the conspirators for violation of her rights under Section 42, Title 8, U. S. C., alone, and specifically alleges facts authorizing recovery by petitioner under the provisions of Sections 47 (2) (3) and Section 48, Title 8, U. S. C.

Appearing in the Appendix are the numbers of the paragraphs of the complaint, with their record pages, alleging denial of equal protection and due process of laws, and of petitioner's privileges and immunities as a citizen of the United States, as follows:

Par. 1 (R. 3); Par. 2 (R. 4); Par. 3 (R. 4); Par. 7 (R. 6); Par. 17 (R. 13); Par. 18 (R. 13-14); Par. 32 (R. 18); Par. 37 (R. 20); Par. 38 (R. 20-21); Par. 42

(R. 23-24); Par. 47 (R. 26); Par. 48 (R. 27); Par. 51 (R. 29); Par. 52 (R. 29-30); Par. 54 (R. 31-32).

The law as applied in *Collins* v. *Hardyman,* 341 U. S. 651-665, decided June 4, 1951, after the filing of petitioner's petition herein on May 26, 1951, demonstrates that the complaint alleges a cause of action under all of the sections of the Civil Rights Acts alleged, and supplements the authorities referred to in petitioner's supporting brief —which establish that respondents' voluminous briefs incorrectly state both the law and the facts as to this record.

The XIVth Amendment does not restrict the authority exercised by the United States in the District of Columbia (*Lappin* v. *District of Columbia,* 22 App. Cas. (D. C.) 68).

It was for this reason that this Court in *Shelley* v. *Kraemer,* 334 U. S. 1, as to the States of Missouri and Michigan, and on the same identical question, applied the XIVth Amendment, and in *Hurd* v. *Hodge,* 334 U. S. 24, held that the rights of the parties in the District of Columbia were governed, not by said Amendment but by Section 42, Title 8, U. S. C., for at l. c. 30 it appears that the XIVth Amendment was not the basis of the decision enforcing the civil rights of the petitioners there, thus:

> "Upon full consideration, however, we have found it unnecessary to resolve the constitutional issue which petitioners advance; for we have concluded that judicial enforcement of restrictive covenants by the courts of the District of Columbia is improper for other reasons hereinafter stated."

The reasons thereinafter stated establish that it enforced the rights there denied to petitioners under Section 42, Title 28, U. S. C.

And, as that statute by its terms applies to states as

well as territories, and since the conspirators have, in violation of said statute, deprived petitioner as a citizen of the United States of her property rights guaranteed by the Constitution, they are liable therefor, both when acting under color of state law and when as individual conspirators they denied to her her privileges as a citizen of the United States as to her property rights provided for by said section. See *White* v. *Davidson,* 181 U. S. 371, l. c. 384, pointing out that the XIVth Amendment does not apply to rights of citizens of the United States acquired and violated in the District of Columbia, and that such rights were governed by Acts of Congress only.

Said Section 42, by its very terms, and under the construction in *Hurd* v. *Hodge,* is a law which is distinct from and separate from the XIVth Amendment, and applies to "all citizens of the United States * * * in every State and Territory."

In any event, pursuant to the conspiracy itself, and by their overt acts, the conspirators impaired the civil rights of petitioner as guaranteed by the Constitution and laws of the United States, and in doing so were supported by state authority in the shape of state officers, laws, customs and judicial and executive proceedings. So that respondents are liable, not alone for violating petitioner's rights under said Section 42, Title 8, U. S. C., but for violating her constitutional rights guaranteed by the XIVth Amendment, and by Section 2, Article IV, of the Constitution.

We again direct attention to the following from the opinion of the Court of Appeals (Pro. 11):

> "But assuming that the state court proceedings were not within the jurisdiction of the courts which decided them, or that they were contrary to state law or procured by fraud or perjury, they were not void but, at most, erroneous."

(*Moffett* v. *Commerce Trust Company,* 187 F. 2d 242, l. c. 248.)

Cooley on Constitutional Limitations, 7th Ed., page 575, states:

> "Individual citizens require protection against judicial action as well as against legislative; * * *"
>
> * * * * * * *
>
> "If it (a court) assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, *and rights of property cannot be divested by means of them.*" (Italics ours.)
>
> * * * * * * *
>
> "The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act * * *"

followed by the following footnote on the same page:

> "(a) Any action taken by a court in the absence of the facts upon which its jurisdiction rightfully rests is void, and may be collaterally impeached. *Scott* v. *McNeal,* 154 U. S. 34, 14 Sup. Ct. Rep. 1108, rev. 5 Wash. 809, 31 Pac. 873, 34 Am. St. 863."

The author of the opinion of the Court of Appeals (Pro. 1-14), since its rendition, and in direct conflict therewith, stated the law as it is stated by the above authorities. Thus:

> "A judgment obtained without due process is a nullity and may be attacked directly or collaterally by parties or strangers."
>
> (*Bradley* v. *St. Louis Terminal Warehouse Co.,* 189 F. 2d 818, l. c. 824.)

Said decision (Pro. 1-14) directly conflicts with the decision of every court of every other circuit which has passed upon the question (*McShane* v. *Maldoven,* 176 F. 2d 1016 (C. A. 6)), a good illustration of which is the opinion in *Picking et al.* v. *Pennsylvania R. Co. et al.,* 151 F. 2d 240, where the court said, l. c. 250:

> "(16-18) As to the defendant Keiffer, the complaint alleges that he was a justice of the peace and that he denied and refused a hearing to the plaintiffs upon their arrest on August 15, 1941. If these allegations be proved it may be concluded that the refusal of Keiffer to act as required by law may have deprived the plaintiffs of their liberty *without due process of law in violation of the Fourteenth Amendment.* If the plaintiffs brought a proper proceeding to secure their liberty before Justice of the Peace Keiffer and he refused their cause, he may be answerable to the plaintiffs in damages. The refusal of a state officer to perform a duty imposed on him by the law of his state because he has conspired with others in a conscious design to deprive a person of civil rights in legal effect may be the equivalent of action taken 'under the color' of the law of the state. Note the second count of the indictment in the classic case wherein it was charged, *inter alia,* that the defendants refused to count votes cast at a primary election and the language of Mr. Justice Stone from the Classic opinion hereinbefore quoted. In making this statement we are not unmindful of the absolute privilege conferred by the common law upon judicial officers in the performance of their duties. Pertinent authorities relating to the common law privilege are collected and discussed in *United States* v. *Chaplin,* D. C. S. D. Cal. C. D., 54 Supp. 926, and in *Allen* v. *Biggs,* D. C. E. D. Pa., 62 F. Supp. 229. See also Jennings, Tort Liability of Administrative Officers. Selected Essays on Constitutional Law, Vol. 4, pp. 1271-1274. The absolute privilege was extended even to the conduct of judicial officers dictated by malice. But

> the privilege as we have stated was a rule of the common law. Congress possessed the power to wipe it out. We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act *sub judice* intended to abrogate the privilege to the extent indicated by that act and in fact did so. Section 1 of the third Civil Rights Act explicitly applied to 'any person.' R. S. 1979 applies to 'every person.' We can imagine no broader definition. The statute must be deemed to include members of the state judiciary acting in official capacity. The result is of fateful portent to the judiciary of the several states."

The decision in *Snowden* v. *Hughes*, 321 U. S. 1, l. c. 9, is in direct conflict with the language of the opinion of the Court of Appeals, stating (Pro. 11):

> "The charge that the state court judgments were intentionally and purposefully against plaintiff, • • • adds nothing to the force or effect of the complaint. *Snowden* v. *Hughes*, 321 U. S. 1."

Whereas, on pages 9-10 of said opinion of this Court, it is said:

> "Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though it is neither systematic nor long continued."

The complaint not only alleges facts showing purposeful discrimination by state judges, but it specifically alleges that said acts were purposeful and intentional—which allegations are shown by the opinion in *Snowden* v. *Hughes* to state a cause of action, for said allegations exclude mere accident or mistake.

Said decision is also in conflict with the opinion in *Burt* v. *City of New York*, 156 F. 2d 791 (C. A. 2), which held

that the complaint alleged a cause of action in a case for damages under Sections 43 and 47 (3). Judge Learned Hand there quoted from *Snowden* v. *Hughes,* holding that if misinterpretation of a statute caused denial of equal protection of the laws is alleged, plus, l. c. 792:

> "* * * an element of intentional and purposeful discrimination,"

it states a cause of action. Judge Hand's opinion proceeds, l. c. 792:

> "* * * but the decision definitely settled it, that, if a complaint charges a state officer, not only with deliberately misinterpreting a statute against the plaintiff, but also with *purposefully singling him out alone for that misinterpretation,* it is good against demurrer." (Italics ours.)

Said complaint (R. 32) alleges facts showing that petitioner was singled out by the conspirators and state officers for discrimination. Among other such allegations is the following:

> "By such acts said states, through said district judge and said executor and administrators, wilfully, intentionally and purposefully discriminated against plaintiff. Said acts denied to plaintiff the application and benefit of the laws applicable to all other persons in general under the laws of said states and the United States."

Said allegations state ultimate facts which are the antithesis of accidental, mistakenly or unintentionally—and therefore purposeful and intentional—under the law as declared in *Snowden* v. *Hughes.*

Paragraphs 56 and 57 (R. 32-33) of the complaint point out that all the acts were done pursuant to the corrupt

conspiracy unlawfully to deprive Thomas S. Moffett and plaintiff of the rights guaranteed to them by the provisions of the Federal Constitution and laws which were theretofore specified, and that the damage was a direct result of all of said acts or omissions, done pursuant to the conspiracy.

The provision in Section 47 (3), Title 8, U. S. C., that

> "In any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

It follows that if any act done by the conspirators which caused even an "erroneous" decision by a court, wherein a court or judge through mistake or error as to either fact or law, caused by overt acts pursuant to such conspiracy, renders a judgment by virtue of which a citizen of the United States—in violation of the due process or equal protection provisions of the XIVth Amendment or other provision of the Constitution or an Act of Congress—is deprived of his property, then such conspirator is liable for the loss. *Mooney* v. *Holohan*, 294 U. S. 103; *Collins* v. *Hardyman*, 341 U. S. 651-664.

Section 42, Title 8, U. S. C., as construed in *Oyama* v. *California*, 332 U. S. 332-689, and as construed in *Hurd* v. *Hodge*, 334 U. S. 24-36, as to the District of Columbia without aid of the XIVth Amendment, rendered such conspirator liable, whether he was a state agent or not, if such act deprived a citizen of the United States of his

property. But, in view of the fact that state officers were members of the conspiracy, then said complaint covers all the Civil Rights Acts, and states a cause of action both under Sections 43, 47 and 48, Title 8, U. S. C.

II.

The authorities referred to in the petition and supporting brief necessitate the granting of the relief prayed. But even if said authorities had no such effect, yet the law declared in *Collins* v. *Hardyman*, 341 U. S. 651-664, compels the grant of that relief.

The opinion there states, as to the requirements necessary to allege a cause of action under Section 47 (3), Title 8, U. S. C., l. c. 660:

> "The 'conspiracy' required is differently stated from the required overt act and we think the difference is not accidental but significant. Its essentials, with emphasis supplied, are that two or more persons must conspire (1) for the purpose of *depriving* any person or class of persons of the *equal protection of the laws*, or of *equal privileges and immunities under the law;* or (2) for the purpose of preventing or hindering the constituted authorities from giving or securing to all persons the equal protection of the laws; * * * (Emphasis the Court's.)

As to requirement (1) the opinion proceeds:

> "They must, we repeat, be 'for the purpose of *depriving* * * * of the *equal protection of the laws*, or of *equal privileges and immunities under the laws*. (Italics supplied.)"

The alleged conspiracy in that case did not come within requirement (2)—whereas the complaint herein specifi-

cally alleges that the conspiracy was for the purpose of hindering the courts from giving or securing to petitioner the equal protection of the laws.

The language used in said Collins opinion and the allegations in paragraph 1 of the complaint (R. 3) bring this case strictly within the law as declared in said Collins case, for it is alleged:

> "This action is for damages caused by overt acts done and caused to be done pursuant to a conspiracy to which defendants were parties, and who conspired for the purpose of impeding, hindering, obstructing and defeating the due course of justice in the States of Missouri, Kansas and Oklahoma, with intent to deny Thomas S. Moffett and plaintiff, as citizens of the United States, the equal protection of the laws, * * *"

The institution of the groundless actions and suits (R. 9-14) and keeping same on the dockets of the courts for the last 20 years, preventing distribution of testator's estate and otherwise causing the damage alleged, amounts to an obstruction of the due course of justice in Missouri, Kansas and Oklahoma, and comes within that variety of conspiracy described in Section 47 (3) covered by said opinion, and also in Section 47 (2), Title 8, U. S. C., as follows:

> "* * * if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, * * *"

The complaint also alleges conspiracy falling within the following provision of Section 47 (3):

> "(3) If two or more persons in any State or Territory conspire * * * for the purpose of depriv-

ing, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * *"

The Collins opinion recognizes that Congress has, in the narrow class of conspiracies defined by Section 47 (2) (3), included the conspiracy charged here. For, in Missouri, the common law of conspiracy is in force, made applicable herein by Section 49a, Title 8, U. S. C., and Section 47 is in fact a duplicate of the Statute of 33 Edw. 1, Stat. 2, sometimes cited as 21 Edw. 1. See *State* v. *Dalton and Fay,* 134 Mo. App. 517, l. c. 528-529, quoting said statute defining conspiracy as follows:

> "Conspirators be they that do confederate or bind themselves by oath, covenant or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, *or falsely to move or maintain pleas,* * * *"

The same statute is in force in Rhode Island. In *State* v. *Bacon,* 61 Atl. 653, 27 R. I. 252, the opinion conclusively establishes the fact that the institution of a groundless action was an obstruction of justice, authorizing redress even during the pendency of the groundless action. Said the court, l. c. 655-656:

> "As to the second count, which charges a conspiracy to pervert or obstruct justice, it charges an offense recognized by the common law. 'Any confederacy or combination, the purpose of which is to obstruct the due course of justice or the due administration of the laws, is an indictable conspiracy.' 8 Cyc. 634; *State* v. *Ripley,* 31 Me. 386. 'All con-

spiracies which have for their object the perversion or obstruction of public justice have been, from the earliest times, regarded as indictable.' 6 Am. & Eng. Ency. L. (2d Ed.) 856; *State* v. *Burnham*, 15 N. E. 396; *State* v. *Norton*, 23 N. J. Law 33; *The People* v. *Chase*, 16 Barb. 495; *Com.* v. *Douglass*, 5 Metc. 241; *State* v. *Noyes et al.*, 25 Vt. 415. Also, although it is not necessary that it should be, the second count of the indictment is clearly within the purview of 33 Edw. I, St. 2, in part as follows: 'Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indite, or cause to indite, or falsely to move or maintain pleas,' etc. The words 'falsely to move or maintain pleas' do not mean, as the defendant argues, the setting up of a false defense. *The evident intent of the statute was to include within its definition those who combine for the purpose of perverting or of obstructing justice through either the criminal or civil jurisdiction of its tribunals. The word 'pleas'* as used in the statute, *is equivalent to 'actions.'* The very name of the court in which the indictment in question was found, viz., the 'common pleas division of the Supreme Court,' is indicative of the place where the pleas of the common people are heard, 'Common pleas: The name of a court having jurisdiction generally of civil actions. Such pleas or actions as are brought by private persons against private persons, or by the government, when the cause of action is of a civil nature.' In England, whence we derive this phrase, common pleas are so called to distinguish them from pleas of the crown.' 'Pleas of the Crown: In English law, a phrase now employed to signify criminal causes in which the King is a party.' Bouvier's Law Dict., Rawle's Revision. Furthermore, the word 'pleas' is broad enough to include the plaintiff's statement of his cause of action as well as the defendant's recital of his ground of defense."

An action for damages occasioned by overt acts pursuant to a conspiracy, whether such overt acts be, or not be, groundless litigation, is an action on the case for conspiracy, and not an action for malicious prosecution.

> "Conspiracy to Use Legal Proceedings Fraudulently to Injure Another.
>
> "Where parties, in pursuance of a conspiracy or combination for that purpose, fraudulently make use of legal proceedings to injure another, an action lies against them, at the suit of the person injured, to recover damages sustained. And the fact that a combination for fraud has been brought to a successful end by false testimony produced on the trial does not make an action for conspiracy obnoxious to the rule that there can be no civil action for perjury or subornation of perjury. By statutory provision in some states, it is a misdemeanor for two or more persons to conspire falsely to maintain any suit, action or proceeding." (12 C. J., p. 588, Sec. 110 3, citing *Verplanck* v. *Van Buren*, 76 N. Y. 247.)

In *White* v. *Scarritt*, 341 Mo. 1004, an attorney and a corporation he represented instituted a groundless suit against President Truman, then presiding county judge, and others, which resulted in damage to a property owner. It was contended there, as here, that the property owner's suit was merely an action for malicious prosecution, and that the suit was a typical taxpayer's suit, authorizing its institution. Said the court, l. c. 1012:

> "Of course, a taxpayer may seek relief from taxes believed unlawful. * * * However, the privilege may not be used for an unlawful purpose. Under pretense of seeking such relief, he may not use the litigation to extort money from another. One may carry upon his person an unconcealed weapon. His motive may not be questioned. However, if he unlawfully uses the weapon, his motive in carrying the same

may be for consideration. • • • The numerous authorities cited by defendant ruling such questions are without application. Furthermore, malicious attachment and malicious prosecution cases are also without application."

In *Kilgore* v. *Dr. P. Phillips & Sons,* 12 So. 2d 465-467 (152 Fla. 578), a judgment for damages caused by the institution of a groundless action pursuant to a conspiracy was affirmed. Said the court:

"The alleged malicious conspiracy consisted not alone in having the suit of *I. Zemurray* v. *Kilgore* brought in the circuit court, but in keeping it in litigation for years and thereby injuring the credit and financial rating of Kilgore in his business, • • •"

• • • • • •

"(1) The declaration contains all the essential elements of malicious conspiracy. It alleges a conspiracy by the defendants to damage the credit and financial rating of the plaintiff; it alleges the overt act done in pursuance of the conspiracy, the bringing of the suit and the damages resulting from the overt act."

• • • • • •

"(6) Much is said in the briefs in reference to the relation of an action for malicious conspiracy to that of malicious prosecution but we consider and treat this as an action for malicious conspiracy to injure the credit and financial rating of the plaintiff. We find no reason for confusing the actions or to be in doubt as to which we are confronted with here."

See also authorities under Reason VIII, page 24 petition for certiorari, among which are the opinions of this Court in *Sovereign Camp Woodmen of the World* v. *O'Neill,* 266 U. S., l. c. 297.

Sections 645 and 646, R. S. Mo. 1939, adopted the common law as to conspiracy (see *State* v. *Dalton*, 134 Mo. App. 517).

Section 4632, R. S. Mo. 1939, duplicated the common law as to conspiracy embodied in 33 Edw. I, reproduced in *State* v. *Dalton, supra,* at l. c. 528-529, thus, in part:

> "Conspirators be they that do confederate or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other * * * *falsely to move or maintain pleas.*"

Since this is a case wherein respondents' motion to dismiss admitted the truth of the allegations contained in the complaint—and the court held that said truth did not state a cause of action—these respondents cannot, in this Court or any other, rely upon the claim that said judgments and the decisions of the courts with reference thereto—including the denial of certiorari in this Court—are *res judicata.*

In *State* v. *Bacon, supra,* the court further said, l. c. 656:

> "Conspiracy to obtain money from an individual or a corporation is a crime well known to and recognized by the law. *State* v. *Buchanan,* 5 Har. & J. 317, 9 Am. Dec. 534. It is unnecessary to wait for the determination of the action at law before charging conspiracy. Prosecutions for conspiracy are preventive, rather than curative, measures. To constitute the crime of conspiracy it is not necessary that the conspirators should succeed. *The State* v. *Norton, supra; The People* v. *Chase, supra.* It is not necessary to aver that the object of the conspiracy has been accomplished."

In *Oyama* v. *California*, 332 U. S. 633, the Chief Justice held that California's acts, l. c. 640:

> "'* * * deprives Fred Oyama of the equal protection of California's laws and of his privileges as an American citizen. In our view of the case, the State has discriminated against Fred Oyama; * * *'"

The order of the Missouri "special" probate judge, appointing Commerce Trust Company in conflicting capacities, and the judgment entries of the Kansas courts, deprived petitioner and her testator of the rights secured to them as citizens of the United States, and secured to them by the privileges and immunities clause of Clause 1, Section 2, Article IV of the Constitution, thus depriving them of the equal protection of Missouri and Kansas law, and of their privileges as American citizens, and discriminating against them.

III.

The issue as to conflicting interests resulting in void judgments was decided against respondents by the judgment in *Re Moffett Brothers Partnership Estate*, 345 Mo. 741-751, and said judgment of the Missouri Supreme Court is now *res judicata* herein against respondents and conclusively establishes the denial of petitioner's federal rights.

In *Moffett* v. *Commerce Trust Company*, 354 Mo. 1098, at l. c. 1129 it is said:

> "The only point decided was that Howard was not entitled to an additional fee. (345 Mo. l. c. 745)."

The basis for said judgment and decision in 345 Mo. 741 was that Mr. Howard and Commerce Trust Company represented conflicting interests (345 Mo. l. c. 750, 751, and R. 48, 49-50, 699, 701) when they caused the

judgment entries to be made in favor of the John Moffett estate, of which Commerce Trust Company was executor, and against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate.

The mandate of the Supreme Court in that case appears in the record (R. 692-701) here, in the last paragraph thereof. Thus (R. 701, 50):

> "The judgment should be reversed and the cause remanded with directions to enter a judgment denying claimant any additional fee, * * *"

Said issues so found established that said Kansas judgments were void, and conclusively establishes that the sacrifice of petitioner's properties to satisfy same was a denial of petitioner's alleged federal rights. (*Phoenix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 322; *Globe & Rutgers Fire Ins. Co.* v. *Hines*, 273 Fed. 774, 777; *Yager* v. *Liberty Royalties Corp.*, 123 F. 2d 44; *Miller's Adm'r* v. *Bidlingmaier*, 26 Mo. 483; *Mueller's Adm'r* v. *Reinhardt*, 31 Mo. 95; *Peyton* v. *Chase County Nat'l Bank*, 124 Kan. 763, 766).

The record shows that respondents relied on said Kansas judgments, both state and federal, as *res judicata* and entitled to full faith and credit (R. 658-663, Statement B. C. Howard) as a basis for the alleged action in the Missouri Supreme Court. The Circuit Court found said issues in favor of respondents (Findings of Fact R. 663-664; Conclusions of Law R. 685-691). But the Missouri Supreme Court refused to give effect to said Kansas judgments as *res judicata*, or as entitled to full faith and credit, and reversed the decision of the Circuit Court based on said judgment and orders, with directions to the Circuit Court to enter a judgment denying Mr. Howard any fee for said services. Said reversal with direc-

tions, under Missouri law, is *res judicata* of the issues so determined, as to such issues in this case. (See *Hecker* v. *Bleisch,* 327 Mo. 377, l. c. 385; *Stump* v. *Hornback,* 109 Mo., l. c. 277; *Chouteau* v. *Allen,* 74 Mo. l. c. 59; *Shroyer* v. *Nicholl,* 55 Mo. l. c. 270).

In *Denny* v. *Guyton,* 331 Mo. 1115, l. c. 1131, the court *en banc* cited the above cases and said:

> "These earlier cases mentioned establish the rule of *res judicata,* followed in the later cases cited, by the determination of the issues on a former appeal, and have been followed in the later cases cited."

In *Dickey* v. *Heim,* 48 Mo. App. 114, the Missouri law is well stated, thus:

> "'A verdict and judgment are conclusive by way of estoppel only as to those facts which were necessarily involved in them, without the existence, proof or admission of which such a verdict and judgment could not have been rendered.' It is denominated a reasoning backward from the judgment to the basis on which it stands, 'upon the obvious principle, that where a conclusion is indisputable and could have been drawn only from certain premises the premises are equally indisputable with the conclusion.' *Burleu* v. *Shannon,* 99 Mass. 203."

This issue was presented in Point 5 on pages 50 to 53 of petitioner's brief in the Circuit Court of Appeals, but said court wholly ignored it, and no mention is made of said point in its opinion (Pro. 1-14). On the contrary that opinion says (Pro. 11):

> "All that the complaint in the present case charges against the individual defendants is that by their resort to the State courts for the settlement and administration of complicated estates the plaintiff,

as one of the interested parties, has been involved in expensive, prolonged and *generally unsuccessful litigations.*" (Italics ours.)

In ignoring said decision of the Missouri Supreme Court, the Court of Appeals rendered a decision directly in conflict with the opinion and decision of this Court in *Cooper* v. *Newell,* 173 U. S. 555, answering certified questions by the fifth circuit as to the duty of a Federal Court in Texas to give effect to a judgment of a Texas court, saying, l. c. 567:

> "And the courts of the United States are bound to give to the judgments of the state courts the same faith and credit that the courts of one state are bound to give to the judgments of the courts of her sister states."

This action necessitates the granting of the writ prayed under that part of Rule 38 5 (b) of this Court, viz:

> "* * * or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

"POINT 5"

(Pages 50-53 of Appellant's (petitioner's) Brief in Court of Appeals is here set out)

The issue herein as to conflicting interests, resulting in void judgments, is *res judicata* against appellees by reason of the judgment in 345 Mo. 741-751.

The decision of the Supreme Court of Missouri, 345 Mo. 741 (692-701, 37-50), was rendered many years after the decisions in the Kansas State and Federal Courts,

and appellees cannot collaterally attack said decision by their reliance upon the decisions which it held were not *res judicata* nor entitled to full faith and credit, and which decisions were based upon facts which rendered them void.

> " • • • where there are two conflicting judgments, the last in point of time is the one which controls." (*Donald* v. *White Lumber Co.*, 180 F. 2d 435.)

> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, *it is a valid exercise of judicial power by the second court.*" (*Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, l. c. 78.)

> " • • • the last judgment controls and determines the right of the parties. The *second* judgment cannot be collaterally impeached by showing the first." (Freeman on Judgments, 5th Ed., Vol. 2, Sec. 629.)

Paragraph 45 (25) of the second amended complaint alleges the filing of a claim by appellee Howard for attorney's fees against his client, Moffett Brothers partnership estate, for his alleged services (against it) in the Harper County litigation. The lower courts rendered judgments in his favor, whereupon this appellant appealed. It is then alleged (25):

> "On appeal by plaintiff, the Supreme Court of Missouri reversed the judgment of the Circuit Court on March 6, 1940, with directions to said circuit court not to allow Mr. Howard any fee for such services. The Official Reporter's Report of the briefs of counsel, and the opinion of said court, is made part hereof as Exhibit 'E'. The same questions were litigated in the Probate Court which were litigated in the Supreme Court, among which were whether

> the decisions in the Kansas courts were *res judicata* and entitled to full faith and credit. The Probate and Circuit courts held in the affirmative, but the Missouri Supreme Court reversed. The issues decided by the Supreme Court are *res judicata* herein."

In addition to reversing the judgment of the Circuit Court, the judgment of the Supreme Court of Missouri recites (702):

> "It is further considered, ordered and adjudged by the court that the said cause be remanded to the said Circuit Court of Jackson County with directions to enter a judgment denying claimant (respondent) any additional fee, * * * "

In *State ex rel.* v. *Patton,* 271 Mo. 554, l. c. 559-560, it is said:

> "In order that a judgment may conclude the parties in a subsequent suit, the cause in which the judgment was rendered need not involve the same facts nor the same claim or demand which was adjudicated in a prior action; the test is whether there is an identity of issues. A former judgment is conclusive in a second suit between the same parties where the same *legal right* as that involved in the former suit comes again in issue, although the second suit is upon a different cause of action. This applies to successive suits brought on a continuing or recurring cause of action (citing cases). Nor does it matter that additional paries are made defendants in this case, because the party pleading the estoppel and the party against whom it was pleaded were both parties to the former action."

Though not expressly mentioned, the Supreme Court of Missouri decided against appellees' contention as to the *res judicata* and full faith and credit effect of the Harper County judgments.

The judgment of the Circuit Court, including its findings of fact (663-684) and conclusions of law (685-691) ruled that the Harper County alleged judgments were *res judicata* and entitled to full faith and credit. Appellees tendered said issue in the Supreme Court of Missouri (658-663).

It was a condition precedent to the judgment of reversal with directions (692-701) that the Supreme Court of Missouri decide as it did—that said alleged judgments were neither *res judicata* nor entitled to full faith and credit. And, though the opinion and judgment are silent as to said issue, yet the record discloses that it was necessarily determined, and is *res judicata* herein in favor of appellant.

Goedecke v. *Gralnick*, 354 Mo. 478, l. c. 487-488, says:

> "But even conceding the cause of action in this case is not the same as that in the 1942 cases, at least the same fundamental issue was common to both litigations. And if that issue *necessarily* was decided adversely to the bank in former cases, it is *res judicata* here, *even though the former judgment did not expressly determine it.* In that event we must look to the pleadings and evidence to see what issues, ultimate or supporting, were passed upon."

The Missouri court there adopts the following as the law, which bound the District Court:

> "Matters which follow by necessary and inevitable inference from the judgment—findings or determinations of the court in relation to the subject matter of the suit which are necessarily implied from its

final decision, as being detrminations which it must have made in order to justify the judgment as rendered—are equally covered by the estoppel as if they were specifically found in so many words, * * * The general rule applies and this is so, although the matter necessarily determined was not in issue under the pleadings, and notwithstanding a constitutional provision requiring the court to consider and decide every point fairly arising upon the record and give its reasons therefor in writing. In other words, it is allowable to reason back from the judgment to the basis on which it stands, and, regarding the judgment as a conclusion, and finding it to be one which could have been drawn only from certain premises, the premises are equally *res judicata* with the conclusion itself. (34 C. J., p. 923, Section 1231.)"

The Supreme Court of Missouri not only found the facts, to-wit: the representation by Commerce Trust Company and B. C. Howard of conflicting interests (48, 48-50), which made the Harper County judgment void—but said Supreme Court went further and decided the issue tendered (661) by said Commerce Trust Company and B. C. Howard and found by the Circuit Court in favor of their contentions, to-wit: that the Harper County judgments were *res judicata* and entitled to full faith and credit in favor of their contentions (687-699)—yet the Supreme Court of Missouri rejected their contention and decided said issue so raised by them AGAINST THEM AND IN FAVOR OF APPELLANT (petitioner) (702, 692)."

At petitioner's request, the Clerk of the Court of Appeals has transmitted a certified copy of her brief in that court to the Clerk of this Court—occasioned by the failure of the Court of Appeals to decide that the judgment of the Supreme Court of Missouri in 345 Mo. 741-

751, as to the Kansas judgments relied on by respondents, was *res judicata,* as required by the rule stated in *Lawrence* v. *State Tax Commission,* 286 U. S. 276-285, l. c. 282:

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked."

The finding by the Missouri Supreme Court of the conflict which rendered the Kansas judgments void (345 Mo., l. c. 750, 751, R. 48, 49-50) and its refusal to give the *res judicata* and full faith and credit to said Kansas judgments prayed by the respondents, renders the issue as to the void Kansas judgments conclusive in this Court as *res judicata* against the contention of respondents that such Kansas judgments are *res judicata* in their favor as alleged in paragraph 45 of the complaint—as more fully appears from the description of the acts of the judges mentioned in Point 7 on pages 45-46 of Commerce Trust Company's brief, set forth in Point IV of this reply brief.

Said judgment of reversal, with directions, disposing of the case, was final under the law as declared by the Missouri courts and this Court. *Smith* v. *Adams,* 130 U. S. 167, l. c. 177, says:

> "A judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case."

IV.

Respondents' claim that the void judgments and orders on which they rely as being *res judicata* is refuted by the record, for the reason that they are void acts of some judges named in Point 7 on pages 45-46 of Commerce Trust Company's brief.

The acts of the judges so named, in connection with the void judgment entries and orders, are referred to as follows:

Petitioner's complaint attacks void judgment entries and orders. Said complaint never named any judge. Respondents give their conclusion that petitioner's attacks were on judges, instead of on void judgments and orders.

The animus of respondents is reflected in their unfounded statement on page 77 of Commerce Trust Company's brief, wherein they seek to switch petitioner's attack on the void acts of Congress, delegating its legislative powers to this Court, to the following:

> "We doubt if petitioner's counsel realizes that this contention in effect says that your illustrious predecessors and the present members of your Court, all learned and able lawyers of outstanding national reputation, have throughout the years in the handling of writs of certiorari *violated the very provisions of the Federal Constitution.*" (Italics Commerce Trust Company's.)

Said counsel had called attention to paragraph 2, Section 2 of Article III of the Constitution:

> "* * * In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Also to the fact that Congress, having been itself charged by said language of the Constitution with the

duty of making exceptions to the appellate jurisdiction vested in this Court by said provision of the Constitution, could not relieve itself of said constitutional obligation and vest in this Court discretionary power to make the exceptions which the Constitution declared only the Congress could make.

It was the duty of said counsel to raise said questions, as recognized in the opinion of this Court in *Von Moltke* v. *Gillies,* 332 U. S. 708, l. c. 726, citing in its Note 9:

> "American Bar Association, Canons of Professional and Judicial Ethics, Canon 15: 'The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or withheld from him, save by the rules of law, legally applied. *No fear of judicial disfavor* or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense." (Italics ours.)

We now call attention to some acts of some of said judges so named by Commerce Trust Company.

The propriety of raising the questions raised is established by the following from the opinion of this Court in *O'Donoughue* v. *United States,* 289 U. S. 516, l. c. 532:

> "Chief Justice Marshall, in the course of the debates of the Virginia State Convention in 1829-1830 (pp. 616, 619), used the folowing strong and frequently quoted language:
>
> > 'The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. * * * I

> have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary.' "

Missouri "Special" Probate Judge.

(1) The only "special" probate judge of Jackson County, Missouri, alleged to be a conspirator in petitioner's second amended complaint was the "special" probate judge referred to in paragraph 2 thereof (R. 3-4). Said paragraph meticulously describes his wrongdoing. Said paragraph alleges that he violated his first duty as a judicial officer, contrary to the law quoted in *American Ins. Co.* v. *Lucas,* 38 F. Supp. 926, l. c. 931-932, by a three-judge court, of which the District Judge in this case and Judge Stone (former Chief Judge of the eighth circuit) were members, wherein, citing a decision of the eighth circuit, they said:

> "As said by the Court of Appeals for this Circuit: 'the first duty (of a judicial officer) is to see that those who minister in the temple of justice shall not invoke his authority for the accomplishment of fraud.' *Zeitinger* v. *Hargadine-McKittrick Dry Goods Co.,* 8 Cir., 244 F. 719, 723. * * * We believe it more essential to preserve the integrity of the courts than to terminate particular litigations. So long as there remains anything which a court can do in a particular litigation to protect its integrity, we think it has power to act: * * *"

(2) Commerce Trust Company's attorney (C. 416-417) refreshed said "special" probate judge's recollection by stating that Thomas S. Moffett was removed "on account of the conflict of interest" and pointed to the unlawful provision inserted by Commerce Trust Company's attor-

ney in John Moffett's will as consideration for writing it and said:

> "* * * I think that the Commerce Trust Company is entitled to appointment * * * if the Trust Company is appointed, it will give its very best service possible, in connection with this, and act in justice and fairness to all the parties interested, * * *"

The counsel who so stated was found guilty by the Supreme Court of Missouri of representing both sides in the same case (345 Mo., l. c. 750, 751), and of having accepted $6,000.00 (R. 25, 700-701) for his disloyalty to one client in denuding it of its property for the benefit of the client who paid him the $6,000.00.

And though the basis of the "special" judge's order of removal or revocation was the law declared in *State to Use Miller's Adm'r* v. *Bidlingmaier,* 26 Mo. 483, and *State to Use Mueller's Adm'r* v. *Reinhardt,* 31 Mo. 95, Commerce Trust Company knowingly caused (R. 168) said "special" probate judge, knowingly and in direct violation of the law on the point, to make an order appointing Commerce Trust Company to administer the conflicting estates on December 28, 1928. The complaint alleges (R. 4):

> "Said order was made for the purpose of enabling Commerce Trust Company as an agent of the State of Missouri to prosecute fictitious claims for its benefit as executor of the estate of John Moffett against itself as administrator of said partnership estates, and to institute and maintain said fictitious claims hereinafter mentioned, and hereby through intentional and purposeful discrimination against Thomas S. Moffett and plaintiff to deprive them of their property without due process of law, and deny to them the equal protection of the laws and of all the rights guaranteed by said XIVth Amendment."

Said "special" probate judge thus had actual knowledge of the fact that Commerce Trust Company had committed a misdemeanor in writing the will of John Moffett (R. 7-8) in violation of the law of Missouri (*State ex inf. Miller* v. *St. Louis Union Trust Co.,* 335 Mo. 845, l. c. 869-870)—which act was also a violation of the public policy of the State prohibiting traffic in the office of administrator (*In re Irwin's Estate,* 123 Mo. App. 508, and the other authorities shown on pp. 37 and 38 of petitioner's supporting brief herein). Said act of Commerce Trust Company, in consideration of its appointment, was the "corrupt procuring of an appointment to an office of trust." So that, the act of said "special" judge amounted to a denial to Thomas S. Moffett and petitioner of the equal protection of the laws guaranteed by Section 1 of the XIVth Amendment to the Constitution, and was an overt act done pursuant to the conspiracy between himself and the Commerce Trust Company and the other conspirators—as a direct result of which they were enabled to proceed to the District Court of Harper County, Kansas, and cause the rendition of the void judgment entries and orders against Commerce Trust Company as Missouri administrator and the loss of petitioner's properties—constituting a denial of petitioner's privileges and immunities while in Kansas, created by Clause 1 of Section 2 of Article IV of the Constitution of the United States, and a violation of all the provisions of the Constitution and laws of the United States alleged in the second amended complaint. The acts of said "special" probate judge entailed the consequences to a state judge outlined in *Picking* v. *Ry. Co.,* 151 Fed. 2d 240, l. c. 250, col. 2.

(3) The iniquity of the act of appointing a disqualified administrator in Missouri is shown by the fact that there can neither be an appeal from an order of appointment

(*State ex rel. Grover* v. *Fowler,* 108 Mo. 405), nor—if Commerce Trust Company's point 12, page 47, of its brief be right—can a collateral attack be made thereon. And yet Commerce Trust Company claims, on pages 9 and 10 of its brief, that a recital in John Moffett's will—placed therein pursuant to the statute referred to in its Appendix, Item 3—authorized the removal of Commerce Trust Company. Whereas the said statute points out that "In the absence of such recital, *" the executor may be removed. Said recital was placed therein for the express purpose of preventing removal. So that the only relief for the wrong of the State is under the Federal Civil Rights Acts.

(4) On pages 10 and 11 of its brief the Trust Company claims it was without pecuniary interest, and states that petitioner does not charge that it had any. The Missouri Supreme Court in *State ex inf. Miller* v. *St. Louis Union Trust Co.,* 335 Mo. 845, at l. c. 864, points out that the Trust Company in said cause made a similar claim—which the court rejected by stating:

> "* * * these mere nominations (as executor) have resulted in attaching business for the transaction of which respondent's annual compensation exceeded $250,000 for each of the years 1926, 1927, 1928, 1929 and 1930."

Said order as alleged in said paragraph 2 (R. 3-4) by said "special" probate judge was the basis for the institution of the many groundless actions (R. 9-14) instituted by Commerce Trust Company, and for its overt acts committed in Missouri, Kansas and Oklahoma. So that, said "special" probate judge, in making said void orders, knowingly and intentionally, under color of state laws, committed most grievous and redressable wrongs against petitioner, resulting in the denial of the Federal rights

alleged, and authorizing recovery under the Civil Rights Acts.

State District Judge Harper County, Kansas.

(1) The acts of the first judge so named by Commerce Trust Company are discussed in the statement in petitioner's petition for certiorari and in Reasons II, IV, VII and XI on pages 21-22, 22, 23-24 and 26 respectively of said petition. His acts are likewise discussed in the statement, and on many other pages of petitioner's supporting brief.

Said judge unlawfully permitted Commerce Trust Company, in conflicting capacities, to intervene in his court (R. 18-19). Said unlawfulness was called to his attention (R. 168), so that he purposefully discriminated against petitioner.

Peyton v. *Chase County Nat'l Bank,* 124 Kan. 763, 766.
State ex rel. v. *Bradbury,* 123 Kan. 495.
Yager v. *Liberty Royalties Corp.,* 123 F. 2d 44.
Globe & Rutgers Fire Ins. Co. v. *Hines,* 273 Fed. 774, 777.
Phoenix Ins. Co. v. *Erie Transportation Co.,* 117 U. S. 312, 322.
Miller's Adm'r v. *Bidlingmaier,* 26 Mo. 483.
Mueller's Adm'r v. *Reinhardt,* 31 Mo. 95.
Clark v. *Crosswhite & Fountain,* 28 Mo. App. 34, l. c. 37-38.
Arrington v. *McCluer,* 326 Mo. 1011, l. c. 1025.
State v. *Stahlhuth,* 183 S. W. 2d 384, l. c. 389.
In re Estate of Padgett, 114 Mo. App. 308, l. c. 316.

Said judge, as established by the judgment in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751, permitted B. C. Howard to act as attorney for Commerce Trust Company in both said conflicting capacities in his

court, notwithstanding a judge and an attorney, both in Missouri and Kansas, are bound by Canon 6 of the Canons of Ethics of the American Bar Association, as adopted by the Supreme Court of Kansas, as shown in 107 Kan., 108 Kan., 110 Kan., 112 Kan., 135 Kan., page IV, 140 Kan., page VII, 156 Kan., page IV, as follows:

> "• • • It is unprofessional to represent conflicting interests, except by express consent by all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client it is his duty to contend for that which duty to another client requires him to oppose."

Said Canon 6 is incorporated in its Rule 35 by the Supreme Court of Missouri (335 Mo., p. VII).

Judge Learned Hand calls attention to said age-old rule in *Silberger* v. *Prudence Bonds Corp.*, 180 F. 2d 917, l. c. 920-921, citing English and Missouri authority, thus:

> "Certainly by the beginning of the Seventeenth Century it had become a common-place that an attorney must not represent opposed interests; • • • "

Bowman v. *Bowman,* 153 Ind. 498, as to an affidavit showing that an attorney represented both sides, said, l. c. 507:

> "The circumstance disclosed by the affidavit of the appellant *made it the imperative duty of the court* to exclude Mr. East from participation in the case as an attorney for the appellee. Weeks on Attorneys at Law, Secs. 120, 277. *Wilson* v. *State,* 16 Ind. 392; *United States* v. *Costen,* 38 Fed. 24." (Italics ours.)

In *Baker* v. *Humphrey*, 101 U. S. 494, 25 L. Ed. 1068, l. c. 502, it is said:

> "It is always dangerous for counsel to undertake to act, in regard to the same thing, for parties whose interests are diverse. • • •
>
> The legal profession is found wherever Christian civilization exists. Without it, society could not well go on. But, like all other great instrumentalities, it may be potent for evil as well as for good. Hence the importance of keeping it on the high plane it ought to occupy. Its character depends upon the conduct of its members. They are officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guaranteed by the highest considerations of honor and good faith, and to these is superadded the sanction of an oath. The slightest divergence from rectitude involves the breach of all these obligations. None are more honored or more deserving than those of the brotherhood who, uniting ability and integrity, prove faithful to their trusts and worthy of the confidence reposed in them. *Courts of justice can best serve both the public and the profession by applying firmly upon all proper occasions the salutary rules which have been established for their government in doing the business of their clients.*" (Italics ours.)

Mr. Howard's testimony conclusively establishing said Judge's failure to perform his "imperative duty" appears from the opinion in *In re Moffett Brothers Partnership Estate*, 345 Mo. 741-751. So that, the issue as to his unlawful and improper conduct depriving petitioner of her property without due process of law, and denying the equal protection of the laws, and denying to her the privileges and immunities in violation of the United States Constitution and laws as alleged in the complaint, is now *res judicata* in this case against respondents.

(2) Said Judge, without notice to petitioner's counsel, held a secret conference at his home town (R. 594) with Commerce Trust Company's counsel on Washington's Birthday 1932 (R. 183, 569, 593-594) during which he ruled (R. 182-183, 241 Par. 4) in accordance with the wishes of said emissaries and Commerce Trust Company (R. 102, 114). That his conduct was improper is established by the opinion in *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, where, citing Missouri authority, it is said, l. c. 541:

> "There are, however, cases where the courts have emphasized the correlative duty of the lawyer to depend solely upon the merits of his client's case and to abstain from all efforts to throw into the scales of justice the weight of his personal influence with the man upon the bench. The legal profession has formulated this primary obligation of the lawyer in the Canons of Professional Ethics of the American Bar Association which provide that a lawyer shall not communicate or argue privately with the judge as to the merits of a pending case, and which denounce any device or attempt to gain from a judge special personal consideration or favor.
>
> The courts enforce these rules by disciplinary action. The attorney who attempts by personal influence to control a judge or jury in their decision in a pending case, or who merely holds himself out as able to do so, whether or not he actually makes the attempt, and whether or not he succeeds or fails in the attempt, in short, an apostate lawyer, who is false to the lawyers' creed that justice shall be undefiled, is ejected from the courts, and as a lawyer ceases to exist. (Citing cases.)
>
> The client who with evil intent employs such an agent fares no better in the instant case. To him also the doors of the courts are closed. From the moment that he ceases to depend upon the justice of his case and seeks discriminatory and favored

treatment, he becomes a corrupter of the Government itself and is fortunate if he loses no more than the rights he seeks to obtain."

Chief Judge Fee, discussing the misconduct of a party, said:

> "(2) The invocation of the fetish of free speech is of no avail here. In judicial proceedings there is no uncontrolled right of speech. The litigant can neither whisper to the judge nor wear placards proclaiming his unfairness. Even a defendant on trial for his life is permitted to speak only at appropriate times and places, under control of the presiding judge." *In re Portland Electric Power Co.,* 97 F. Supp. 903, l. c. 909.)

The same judge, Chief Judge Fee, in another case entitled *In re Portland Electric Power Co.,* 97 F. Supp. 895, l. c. 896, said:

> "Any pressure upon the court, or attempts to influence judges by communication outside of court, savors of an attempt to obstruct justice."

(3) The Missouri Supreme Court in its opinion in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751—wherein Mrs. Weede was a party, and Mr. Weede represented Mr. Howard and Mr. Bush, now counsel for Mr. Howard, represented Commerce Trust Company with other counsel of record herein—stated the law with reference to the duty of counsel (R. 750-751). That court and the Missouri Appeals Court have cited said Moffet case in the six cases:

Hoffman v. *Hogan,* 345 Mo. 903, l. c. 914 (disloyalty to client).

Fanchon & Marco, Inc. v. *Leahy,* 351 Mo. 428, l. c. 457 (conflicting interests and conspiracy).

Sluggett v. *Phillips,* 178 S. W. 2d 458, l. c. 462 (conflicting interests).
Pfiffner's Guardianship, 194 S. W. 2d 233, l. c. 236-237 (conflicting interests).
In re Elam, 357 Mo. 922, Bar Committee's Brief, l. c. 925 (disbarment).
In re Buder, 217 S. W. 2d 563, l. c. 574 (disbarment proceedings, conflicting interests, breach of fiduciary relations and trust duties).

In *Buder* v. *Fiske,* 174 F. 2d 260, l. c. 267, Judge Stone (C. A. 8) cited the Moffett case authority, as did the court in *Fraser* v. *Crouse,* 56 At. 2d 54, l. c. 55.

(4) In *In re Buder,* 358 Mo. 796, the Supreme Court of Missouri *en banc* cited *In re Moffett Brothers Partnership Estate,* 345 Mo. 741, as an authority disclosing that the conduct of the Missouri "special" probate judge, and the judge of the Harper County, Kansas, District Court, who permitted them so to do, and of Commerce Trust Company and of Mr. Howard, was unlawful. Said the court, l. c. 815:

> "The policy of the law, the rules of this Court, the Canons of Ethics and the adjudicated cases have long held that a lawyer can have but one client in any given matter. Not even the most versatile lawyer 'can serve two masters.' He cannot represent interests that are or may be conflicting except by express consent of all concerned given after full disclosure of all facts. The law abhors a breach of fidelity to the client's interest. *Hoffman* v. *Hogan,* 345 Mo. 903, 137 S. W. 2d 441, 446, *Moffett Bros. Partnership Estate* v. *Moffett,* 345 Mo. 741, 137 S. W. 2d 507, 511, *Rochester* v. *Gonterman* (Mo.), 49 S. W. 2d 71, *National Hollow Brake Beam Co.* v. *Bakewell,* 224 Mo. 203, 123 S. W. 561, 567. *In re Pfiffner's Guardianship* (Mo. App.), 194 S. W. 2d 233. *In re*

Conrad, 340 Mo. 582, 105 S. W. 2d 1. Supreme Court Rule 4.06. *Fiske* v. *Buder,* 125 Fed. 2d 841."

The foregoing discloses that neither Commerce Trust Company, nor its counsel, nor their confederates, subscribed to the doctrine stated by Chief Justice Cockburn as follows:

> " 'The arms which an advocate wields he ought to use as a warrior, and not as an assassin. He ought to uphold the interests of his clients *per fas,* not *per nefas.* He ought to know how to reconcile the interests of his clients with the eternal interests of truth and justice.' This knowledge must come to every man who is worthy to minister at the altar of justice and to feed its sacred and undying flame." (The Story of the Law, John M. Zane, p. 306.)

(5) Said counsel admits (R. 102) that the change resulting from the trip to Kingman (R. 114-115) of a judgment entry in favor of petitioner's sister for approximately $130,000.00 was entered on March 5, 1932, substituting Commerce Trust Company, as conclusively established by Mr. Weede's letter (R. 182-183) and affidavit (R. 241, 4th par.) which also shows said judge's dereliction.

(6) Paragraph 44 (R. 24-25), and motion to substitute amendment for paragraph 44 (R. 237-240) shows that said Judge appointed Messrs. Howard and Weede (R. 24) as a committee to take petitioner's Missouri counsel before the Ethics Committee of the Supreme Court of Kansas, for the purpose of preventing petitioner from having effective representation during the contemplated overt acts of the conspirators, one of whom was said Judge. Respondents know what said Judge and their committee did, and if there were a record showing that

the Ethics Committee ever took any action against said counsel, it is plain that Commerce Trust Company—as shown by its statements in its Point 7 on its pages 45-46—would have produced it in the record and called this Court's attention thereto. But as it was merely an intimidating overt act which accomplished its purpose, and was done in bad faith by said Judge and said respondents, it conclusively appears that said act was done by the State through its district judge, in abuse of his powers, so as to abridge petitioner's protected federal rights in her property. For petitioner was entitled to exercise her right to institute the action in the federal court in an attempt to protect her property right, and was entitled to be protected against official reprisal for having exercised it.

Bomar v. *Keyes,* 2 Cir., 162 F. 2d 136.
Picking v. *Pennsylvania R. Co.,* 3 Cir., 151 F. 2d 240.
Burt v. *City of New York,* 2 Cir., 156 F. 2d 791.
Terminiello v. *City of Chicago,* 1949, 337 U. S. 1, 69 S. Ct. 894.
Douglas v. *City of Jeanette,* 1943, 319 U. S. 157, 63 S. Ct. 882, 146 A. L. R. 81.

(7) Said Judge as a conspirator, having deprived petitioner of effective representation, made orders misappropriating the partnership lands in Kansas of Moffett Brothers, in which petitioner had a majority interest, by approving false credits (R. 22) on the void judgment entered against Commerce Trust Company (R. 20, 115-139), and to satisfy same—manifestly to further the purpose of the conspiracy and in revenge for the act of petitioner in attempting to enjoin the enforcement of his void judgment.

(8) Though absolutely without jurisdiction so to do, said Judge entered a decree (R. 370-388-395)—sitting in his Kansas court—partitioning 17,000 acres of Oklahoma lands in which petitioner owned a majority interest, notwithstanding the law as declared by the Oklahoma and Kansas Supreme Courts, and also by this Court, held such judgment void. In *Sharp* v. *Sharp,* 166 Pac. 175, the Oklahoma court said, l. c. 177:

> "Fourth. Jurisdiction to render a judgment in *rem inheres* only in the courts of the state which is the situs of the res. *Watkins* v. *Holman's Lessee,* 16 Pet. 25, 10 L. Ed. 873; *Harrison* v. *Harrison,* L. R. 8 Ch. 342; *Davis* v. *Headley,* 22 N. J. Eq. 115; *Clopton* v. *Booker,* 27 Ark. 482; *Williams* v. *Nichol,* 47 Ark. 254, 1 S. W. 243; *Winn* v. *Strickland,* 34 Fla. 610, 16 South 606; *Poindexter* v. *Burwell,* 82 Va. 507; *Cooper* v. *Ives,* 62 Kan. 395, 63 Pac. 434; *Smith* v. *Smith,* 174 Ill. 52, 50 N. E. 1083, 43 A. L. R. 403."

In *Jefferson* v. *Gallagher,* 150 Pac. 1071, the court said, l. c. 1077:

> "In *Larimer* v. *Knoyle,* 43 Kan. 344, 23 Pac. 489, that court says: 'It is well settled in this state that a judgment rendered without jurisdiction is void, absolutely and entirely, and may be shown to be void in a collateral as well as a direct proceeding, and by extrinsic evidence as well as by the evidence itself."

(9) Said Judge made orders directing Commerce Trust Company, as Missouri administrator of Moffett Brothers partnership estate, to transfer Moffett Brothers Oklahoma land to the John Moffett estate (R. 540-549) and afterward to Mrs. Weede (R. 551-559), which acts were void under the law declared in *Sharp* v. *Sharp, supra,* citing *Watkins* v. *The Lessee of Holman et al.,* 16 Pet.

25, holding that a Massachusetts administrator's deed was inoperative to transfer Alabama land, thus, l. c. 57:

> "That the deed is inoperative is clear. It was executed by the administratrix under a decree or order of the Supreme Court in Massachusetts, and by virtue of a statute of that State. The proceeding, it is not pretended, was authorized by any law of Alabama. And no principle is better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the State where the land is situated."

Said District Judge of Harper County, Kansas, was liable had he been a party under the law stated in *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240, l. c. 250:

> "The statute must be deemed to include members of the state judiciary acting in official capacity. The result is of fateful portent to the judiciary of the several states."

In *Snyder* v. *Massachusetts*, 291 U. S. 97, l. c. 116, Justice Cardoza said:

> "Due process requires that the proceedings shall be *fair.*"

Would not any jury have a right to draw inferences from the admitted and conceded facts—that the proceedings *could not be fair* where the same counsel represented conflicting interests, and the judge acted as above set forth?

Said Justice Roberts, in the same case, l. c. 137:

> "But where the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a *fair* way.

> Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of *fairness* be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was *unfair*, the result is just."

In *Weidekind* v. *Water Co.*, 74 Cal. 386, it was pointed out that where a counsel gets on both sides of a case, either at the same or different trials, then the losing party cannot have a fair trial of his case, thus, l. c. 388-389:

> "The trial court has a right and *it was its duty* to have forbidden the attorney from changing sides in the same suit though at different trials; for to do otherwise was 'to defeat the very purpose for which courts were organized, viz: the administration of justice.' * * * injury must be presumed to have resulted to the plaintiff, whereby he was *prevented from having a fair trial* of his case." (Italics ours.)

And so, petitioner was denied due process of law in the above proceedings by said Kansas State District Judge, in cooperation with respondents, in violation of the XIVth Amendment.

The District Court's opinion establishes the truth that the complaint states a cause of action. For, in referring to the charge in the complaint, its opinion contains the recital (R. 782-783):

> "In the case of '*Sullivan* v. *Felix*, 194 Fed. 88, the Court of Appeals, for the Fifth Circuit, said in reference to a similar action:
> 'We find no federal statute of limitations applicable to the case.' This case was affirmed by the Supreme Court, 233 U. S. 318. This is unfortunate for the reason that where a state or states are

> accused of oppressive discrimination, as in this case, there should be a speedy and prompt presentation of the facts as a matter of quasi public concern."

It thus appears that the District Court recognized the truth, that the complaint in this case made it a case

> " * where a state or states are accused of oppressive discrimination"

by the use of the words

> "as in this case."

In view of the fact that no State can be charged with discrimination in an action under the Civil Rights Acts —save and except through its officials and agents—and in view of the fact that the Missouri "special" probate judge and the Kansas state district judge of Harper County, and an executor and administrator, were the only officials charged in the complaint with such discrimination under the Civil Rights Acts—it necessarily follows that said statement was an affirmative finding that the complaint stated a cause of action. This statement, in itself, necessitated a reversal, instead of an affirmance, by the Court of Appeals.

The law as to limitations herein is stated in *Kansas City* v. *Rathford,* 353 Mo. 1130, l. c. 1145; and in *State ex inf. Taylor* v. *American Ins. Co.,* 355 Mo. 1053, l. c. 1118-1123.

(10) The second Judge named by Commerce Trust Company awarded Tom Moffett's Comanche County farm to Helen Weede (R. 16-17), in violation of the law of Kansas, as pointed out in Point VIII of petitioner's supporting brief on pages 47 to 49.

"Individual citizens require protection against judicial action as well as against legislative; and perhaps the question, what constitutes due process of law, arises as often when judicial action is in question as in any other cases. * * *

A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be divested by means of them.

It is a maxim in the law that consent can never confer jurisdiction: by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon considerations of general public policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties.

Accordingly, where a court by law has no jurisdiction of the subject matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all. Consent is sometimes implied from failure to object; but there can be no waiver of rights by laches in a case where consent would be altogether nugatory."

(Cooley's Constitutional Limitations, 7th Ed., 575-576.)

And, in violation thereof, said first named judge's partition and distribution decree again awarded said Comanche Farm, along with other lands, to Helen Weede (R. 370, 386) at her request (R. 359-361, 386), evidently on the singular theory that two void judgments are equivalent to one valid judgment!!

Kansas Supreme Court Judge.

Commerce Trust Company asserts on page 46 of its brief that petitioner

> "* * * insinuates and intimates that the full bench of the Supreme Court of Kansas, and of the Circuit Court of Appeals for the Tenth Circuit, and Federal Judge Hopkins were all participants in the claimed conspiracy along with the Kansas District Judge Hay."

Its record basis for said statement contains its own language (C. 955):

> "Commerce Trust Company, in its 94 page document called 'Further and Additional Responses' filed August 27, 1948, says on pages 8c-8d of its 'Foreword':
>
> > 'Plaintiffs will not have the temerity to reduce their claims to absurdity by alleging that the full bench of the Supreme Court of Kansas and of the Circuit Court of Appeals for the Tenth Circuit, and Federal District Judge Hopkins, were all participants in the claimed conspiracy along with the Kansas District Judge Hay.'"

It thereby proves that petitioner did not so "insinuate" and "intimate," and that her claim is valid and not absurd, by stating that if petitioner made the allegations

suggested that it "would reduce" petitioner's claims "to absurdity."

Did Commerce Trust Company have reason to believe that some acts of some judge it mentions would warrant such allegations? Otherwise, why suggest it?

And now that Commerce Trust Company has so "insinuated and intimated," it is appropriate to call this Court's attention to what some judge did.

The same Justice who wrote the opinion in *Peyton* v. *Chase County National Bank,* 124 Kan. 763, January 7, 1928 (cited by him as authority long after his decision in the Moffett case, in *Wolcott & Lincoln* v. *Baker,* 155 Kan. 105, 110), quoting *State ex rel.* v. *Bradbury,* 123 Kan. 495, in both of which he personally recognized, and was fully conscious of the fact and the law, that a judgment prosecuted by a party against himself, representing conflicting interests, was, and is, void. He also wrote the opinion in *Moffett* v. *Moffett,* 131 Kan. 582, in the July term, 1930 (before Tom Moffett's death), some 18 months after writing the opinion in the Peyton case, saying, l. c. 588:

> "Appellant contends that the Commerce Trust Company is intervening in two capacities which are in conflict. But we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective rights of the parties."

He also wrote the opinion in *Clark* v. *Moffett,* 136 Kan. 711, on appeal from the state district judge's void judgments, in January term, 1933 (after Tom Moffett's death), recognizing said contention.

The conflicts so recognized by said judge as existing in the record before him were the same conflicts shown by the same record, later condemned by the Supreme Court

of Missouri in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741, l. c. 750, 751, the judgment in which is *res judicata* against respondents, and against said opinions and decisions of said Kansas Supreme Court Judge.

Said opinions and decisions, in addition to destroying petitioner's federal and property rights, conflict with the statute of wills of the State of Kansas, denying Mrs. Weede any interest in her deceased husband's estate. See petitioner's supporting brief, pages 47 to 49.

Said question was raised in the brief in the Court of Appeals in Point 9 on pages 58-71. Said statute of wills was construed in *Vanek* v. *Vanek,* 104 Kan. 624. Sections 60-3317 and 60-3330 required the Supreme Court of Kansas in any case pending before it to render such final judgment as it deems that justice requires:

> "* * * and shall send a special mandate to the court, requiring such judgment or order to be entered and that execution be awarded thereon."

That court held that said statutes compel the Supreme Court of Kansas to render a judgment in accordance with the law of Kansas (*Denlin* v. *City of Pleasanton,* 130 Kan., l. c. 773, and *Majors* v. *Seaton,* 142 Kan., l. c. 282).

Petitioner's Exhibit 4 (R. 353) is the judgment of reversal in the Vanek case, and her Exhibit 7 (R. 356-357) is the mandate of that court "with directions to render judgment for the defendants," which conclusively establishes the law of Kansas as it is declared in said statute of wills—to the effect that the childless widow of a husband who died childless and who made his will while a bachelor, and who was never the parent of any child (R. 17) has no interest in his estate in Kansas. See also *Schippel* v. *Jennerson,* 169 Kan. 151, l. c. 166, where the Kansas Supreme Court expressly ruled on Sec. 22-238,

R. S. Kan. 1923, 1935, to the same effect. (See Appendix to petition, page 33.)

It is apparent that Commerce Trust Company wondered why these facts were not called to the attention of this Court by petitioner, and hence "intimated" and "insinuated" what it untruly asserts petitioner did.

Petitioner having called attention to the fact that the judgment of the district court was void, and that an appeal from such judgment does not make it valid, did not find it necessary to discuss the acts of the judge above mentioned. For an appeal from a void judgment does not make it valid (*Revere* v. *Revere,* 133 Kan. 300, l. c. 302-303).

The Court of Appeals for the 8th circuit in *Missouri ex rel.* v. *Stormfeldz,* v. *Guaranty Title & Trust Co.,* 72 F. 2d 595, have held that an appeal from a void judgment does not make it valid. This question was raised in Point 8 of petitioner's brief in the Court of Appeals, pages 56-57, and was ignored by that court.

Even though such Justice did wrong, it was unnecessary for petitioner to call attention thereto until Commerce Trust Company here compelled her to do so.

Now, without intimation, insinuation or suggestion, the facts are here stated which compel the conclusion that both the district and supreme courts of Kansas denied petitioner's alleged federal rights through the judge of the state district court, and the Justice who wrote the opinions in the Moffett case.

It is apparent that a jury would be entitled to make some inferences from said facts as to whether or not said Justice did not knowingly deprive petitioner of her federal rights under the law declared in *Picking* v. *Pennsylvania R. Co.,* 151 F. 2d 240, l. c. 250.

Kansas Federal Court Judgments.

The dismissal of the suit to enjoin the enforcement of the judgment entry of the Harper County, Kansas, district judge was not *res judicata* because:

(1) The Federal district and appellate courts were without jurisdiction to enjoin such enforcement—that is, the proceedings in the state court—under then Section 262, Title 28, U. S. C. (*Toucey* v. *United States,* 314 U. S. 118), later overruled by Congress (Section 2283, Title 28, U. S. C.).

(2) Judge Hopkins dismissed the case without opinion May 27, 1935 (R. 784-785), on the ground stated in the order that (R. 785):

> "* questions embraced in said third amended bill in equity and the two said amendments thereto were either presented to the District Court of Harper County, Kansas, and the appellate courts in said suit, or could have been presented in said suit, * * *"

Nothing in the order of dismissal refers to a reservation with reference to an opinion. The transcript of the record was filed in the Tenth Circuit on July 9, 1935 (W. 37). The opinion was filed September 4, 1935, as appears from 14 F. Supp. 602. It was Exhibit "A" in the Appendix of respondents' brief, filed September 4, 1935.

(3) The dismissal was not on the merits, and hence the judgment of dismissal was not *res judicata.* See *Hughes* v. *United States,* 4 Wall. 232-237, where this Court held, l. c. 237:

> "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties,

> or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. *Walden* v. *Bodley,* 14 Pet. 156; 1 Greenl. Ev., secs. 529, 530, and authorities there cited."

(4) Judge Bratton affirmed on the ground that the fraud was intrinsic and not extrinsic, saying, 81 F. 2d 434:

> "The judgment was affirmed, *Clark* v. *Moffett,* 136 Kan. 711, 18 P. 2d 555. Certiorari was denied (290 U. S. 642, 54 S. Ct. 61, 78 L. Ed. 558) and motion for leave to file petition for rehearing was likewise denied, 290 U. S. 602, 54 S. Ct. 227, 78 L. Ed. 528."

(5) None of these respondents were parties to the injunction suit in the Federal courts in Kansas, and as Robbins was separately liable as a conspirator, even had there been a judgment on the merits in his favor, it could not be *res judicata* as to the respondents or any one of them (*Bomar* v. *Keyes,* 162 F. 2d 136, citing *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111).

(6) Said judgments of said Federal courts were pleaded as *res judicata* in the Howard fee case, 345 Mo. 741-751, by the respondents there where, in the record before the Supreme Court of Missouri in said case, they were denied any *res judicata* or full faith and credit effect, as were the judgments sought to be enjoined. And, as the judgment in 345 Mo. 741-751 was the last judgment, it controls.

(7) The verified allegations contained in Mr. Weede's Exhibit 1 (W. 36-261) constitutes evidence tending to establish the truth of the allegations of the complaint. (Greenleaf on Evidence, 14th Ed., Section 201) and must

be considered by the jury under the rule that all parts of a statement must be construed by the jury, which rule is well stated in said section as follows:

> "* * * it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him."

Kansas Federal Judges.

As to the opinions of District Judge Hopkins, and of Judge Bratton of the court of appeals for the tenth circuit, these respondents have not mentioned the fact that no party here was a party to the injunction suit to stay proceedings on the void Kansas judgment entry in the federal court in Kansas, and that their claims that the decision that the fraud was "intrinsic" is *res judicata* as to them is contradicted as to this civil rights action by *Bomar* v. *Keyes,* 162 F. 2d 136, where Judge Learned Hand, citing *Bigelow* v. *Mining Co.,* 225 U. S. 111, held that the complaint stated a cause of action under the Civil Rights Acts against one conspirator which was not barred by the failure of a ministerial proceeding or a court action against a joint wrongdoer, l. c. 140:

> "* * * because Keyes was not a party either to the proceeding or to the action; and, being a tort feasor with the Board and liable separately, she was not a 'privy' to the judgment in its favor."

Said Federal judges were also without jurisdiction to enjoin proceedings in a state court (*Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118-154).

Nor did said judges have before them the opinion in *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751, announced March 6, 1940, some 5 years after the fail-

ure to obtain relief in the injunction suit in the Kansas Federal Court in 1934-1935 in the vain effort to prohibit proceedings resulting in the loss of petitioner's property.

Though it appeared from the bill that the judgment against Commerce Trust Company, as Missouri administrator of Moffett Brothers partnership estate (R. 20-21), was void, and though it also appeared that Commerce Trust Company, as executor of John Moffett's estate, through its attorney, Mr. Howard, offered the evidence which resulted in a judgment against his other client (R. 48, 699—Commerce Trust Company, as Missouri administrator of Moffett Brothers partnership estate—yet Judge Bratton in *Moffett* v. *Robbins,* 81 F. 2d 431, failed to give effect to the decisions of this Court, and of the Supreme Courts of Missouri and Kansas in that case—which Kansas decisions and opinions he later cited in *Yager* v. *Liberty Royalties Corporation,* 123 F. 2d 44, as correctly stating the law which should have been applied by him, but was evidently overlooked by him.

His opinion as to this question follows at l. c. 435-436 of 81 F. 2d:

> "It is equally well settled by the decisions of this court and others that a United States court cannot vacate a judgment or decree of a state court, nor mandate that court to do so.
>
> * * * * * * *
>
> But such relief will be granted only upon fraud extrinsic to the matters tried and determined by the other court and which caused the court to render a wrong judgment, such as the successful party through fraud or deception preventing the unsuccessful from presenting his case, or from attending the trial, *or where his attorney was induced to betray his client's interest, or other chicanery of that kind.* The submission of perjured testimony or a fraudulent instrument on which the judgment rests is not enough, be-

> cause a matter of that kind is necessarily *intrinsic* the proceedings. *United States* v. *Throckmorton,* 98 U. S. 61, 25 L. Ed. 93; *Luikart* v. *Farmers' Lumber Co.* (C. C. A.), 38 F. (2d) 588. In order to come within the rule, it must appear by clear allegations of fact that the party asserting it had a valid defense to the cause of action on which the judgment was rendered; that he was prevented by *extrinsic* fraud, accident, mistake, concealment, or other chicanery from presenting such defense, and that he had not been negligent of availing himself of it." (Citing cases.)

Nevertheless, he applied an obsolete rule as to intrinsic and extrinsic fraud, contrary to the opinion of this Court in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 322 U. S. 328, cited in *Sutter* v. *Easterly,* 189 S. W. 2d 284, 162 A. L. R. 437.

Of course, neither Judge Hopkins nor Bratton had the same advantage as did the Court of Appeals or the District Court herein, which had the decision and opinion of the Supreme Court of Missouri in *In re Partnership of Moffett Brothers,* 345 Mo. 741-751, in which that court denied *res judicata* and full faith and credit to Judge Hopkins and Bratton's opinions and decisions—holding that Commerce Trust Company and its attorney, B. C. Howard, were guilty of obtaining judgments by representing conflicting interests (R. 699, 701). Said judgments, by virtue of facts found in said cases, are void both under the decisions of Kansas and Missouri and this Court.

Nor did the Supreme Court of Kansas, nor Judge Bratton of the Tenth Circuit have the benefit of the finding set forth in the decision and opinion of the Supreme Court of Missouri to the effect that Commerce Trust Company, as executor of the John Moffett estate, paid B. C. Howard $6,000.00 (R. 25, 700) for betraying his

other client, Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate—knowledge of which fact would have compelled said Federal Courts to enjoin the execution of the void judgment, under the law stated by Judge Bratton, if it were not for the decision in the Toucey case (314 U. S. 118). For the payment of said sum to Mr. Howard was an extrinsic fact which must have resulted in accordance with the rule stated by Judge Bratton as to intrinsic and extrinsic fraud.

The opinion in the Howard fee case (R. 692-701) shows that Mr. Howard was paid $6,000.00 (R. 700-701) by Commerce Trust Company as executor for his misrepresentation of Commerce Trust Company as administrator —which fact did not appear in the record before Judges Hopkins and Bratton, who found that respondents' fraud was "intrinsic."

It is not alleged in Mr. Weede's Exhibit 1 (W. 36-261) that said district judge of Harper County was a conspirator with the others in that case, nor is it alleged therein, nor could it have been, that Mr. Howard was thereafter paid by Commerce Trust Company, as executor of the John Moffett estate, to betray Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate—and incidentally petitioner as beneficiary of Moffett Brothers partnership estate—by offering the false testimony manufactured by respondents (R. 23-24, 699) against Commerce Trust Company as administrator of, and petitioner as majority owner of, Moffett Brothers partnership estate.

And so, said Federal Court decisions fall of their own weight.

In *American Ins. Co.* v. *Lucas,* 38 F. Supp. 926 (affirmed 129 F. 2d 143 [C. A. 8], certiorari denied 317

U. S. 687, rehearing denied 317 U. S. 712) the court, consisting of three judges, thus declared the law, l. c. 930:

> "That the bribery here involved would be such 'extrinsic' fraud is certain. *Barrett* v. *Kunkel,* 8 Cir., 259 F. 394."

In *Barrett* v. *Kunkel, supra,* the Court of Appeals for the 8th Circuit said:

> "The cross bill and the offer of proof show that Hannah Bennett's attorney Crump, while purporting to act as her counsel, in securing the approval of the deed, and in causing a decree to be entered in her case against Semmes and Litchfield, forever barring her right to the property, was in fact acting on behalf of Litchfield, *and upon a consideration paid him,* and that Hannah was wholly ignorant of what was going on when the deed was approved * * * *One who seduces an agent to betray his principal, or an attorney his client, can hold none of the fruits of his bargain. Alger* v. *Anderson,* 78 Fed. 729, and cases there cited." (Italics ours.)

The only judges who were charged with being parties to the conspiracy were the Missouri "special" probate judge, and the Judge of the District Court of Harper County, Kansas. What these judges did, and the loss they occasioned pursuant to the conspiracy, was, and is, in itself sufficient to give jurisdiction to the District Court and Court of Appeals, and to this Court, to grant the relief sought for the loss resulting from all the overt acts.

Of the other questions, whether they are questions of state or federal law, since they are part of the same cause of action, they authorize recovery herein against respondents for the total damage, under the principle stated

in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 174, this Court said:

> "The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, * * * "

And in view of the fact that the dropping of the six words "or for any error in fact" from Section 1011 R. S. U. S. has reinvested the appellate jurisdiction of this Court as to the facts, under the opinion of Judge Holmes in *Sunray Oil Co.* v. *Allbritten*, 188 F. 2d 751, l. c. 756, then this Court, having appellate jurisdiction as to the facts under the provisions of Section 2106, Title 28, U. S. C., is authorized to enter a judgment for the full amount prayed for in petitioner's complaint, together with her costs.

The fact that Commerce Trust Company has been permitted by the courts to wreak its will upon petitioner and her deceased husband warrants the conclusion that the same situation exists in the heart of the United States as that depicted by Sir William Holdsworth in his Tagore Lectures at Calcutta in the year 1938:

> "In 1440 Mr. Justice Paston strongly advised a friend not to go to law with one who had the support of the Duke of Norfolk. 'For if thou do, thou shalt have the worse, be thy cause never so true, for he is in the pay of my lord of Norfolk, and much is of his counsel; and also thou canst get no man of law in Norfolk or Suffolk to be with thee against him; and therefore my counsel is, that thou make an end whatsoever thou pay, for he shall else undo thee and bring thee to nought.' "

Missouri's Probate Judge.

The wrongdoing acts of the probate judge of Jackson County were alleged (R. 27) without naming him. He made the order (R. 421-422) for the sale of the Kansas Hymer Ranch (R. 423-424), which was never owned by John Moffett or his estate (R. 417, 419, 155-156, 190-194), by Commerce Trust Company as Missouri executor, and the order for the transfer of the Oklahoma lands by Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate (R. 540-549). The only thing wrong with said orders—sought and obtained by Commerce Trust Company (R. 540)—was that under the laws of Missouri, Kansas and Oklahoma, and under the law declared by this Court (*Clarke* v. *Clarke,* 178 U. S. 186)—said orders authorizing the transfer of lands in States other than Missouri were void, and gave no authority to Commerce Trust Company to "sport away" petitioner's vested rights, as declared in the rule stated by Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch. 137, l. c. 166; and as pointed out by the Supreme Court of Missouri in *Partnership of Henry Ames & Co.,* 52 Mo. 290, where it is said, l. c. 293-294:

> "The law seems to be well settled, that an administrator has no authority to transfer assets, except such as have their *situs* within the territorial limits of the Government granting his letters.
>
> This point was determined by this Court in *McCarty* v. *Hall,* 13 Mo. 480, where the authorities were reviewed at some length, and we see no reason for departing from the doctrines laid down in that case. See also *Naylor's admr.* v. *Moffat,* 29 Mo. 126; *Minor* v. *Cardwell,* 37 Mo. 350."

Missouri expressly holds, in *Bank of Seneca* v. *Morrison,* 200 Mo. App. 169, such an order of a Missouri probate court void, saying, l. c. 178:

> " * * * said order is void for the reason that the land respecting which the order was made is not in this State. The power of the administratrix as such did not extend beyond the boundaries of this State. As administratrix here she had no power or authority over property in Oklahoma belonging to her intestate."

Said opinion cites many cases involving partnership and other estates in other states.

In *Pinet* v. *Pinet,* 239 Mo. App. 500, l. c. 505, as recently as December 1945, the Missouri appellate court said:

> "Our courts have uniformly held that debts due from a Missouri debtor to a nonresident decedent are *assets* in Missouri. (*In re Estate of Henry Ames,* 52 Mo. 290; *McCarty* v. *Hall,* 13 Mo. 480; *Becraft* v. *Lewis,* 41 Mo. App. 456; *Miller* v. *Hoover,* 121 Mo. App. 568; *Crohn* v. *Clay County Bank,* 137 Mo. App. 712; *Harnett* v. *Langan,* 282 Mo. 471, 490.)"

Referring to *McCarty* v. *Hall, supra,* the opinion proceeds, l. c. 505:

> "The court quotes with approval pertinent language from a decision of the Supreme Court of Massachusetts in *Jones* v. *Godwin,* 3 Mass. R. 514; 'Debts due the testator, at the time of his death, from persons residing in other states, are placed by law on the same ground as goods and chattels belonging to him and *being in another state.* Over these she, as executrix, deriving her authority under the law of Massachusetts, has no control.' "

In *Johnson* v. *Powers,* 139 U. S. 156, l. c. 158, this Court held that an administrator appointed in Michigan could not function in a New York court, State or Federal, thus:

"The plaintiff certainly cannot maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect, because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that State, and cannot authorize him to maintain any suit in the courts, either state or national, held in any other State. *Stacey* v. *Thrasher*, 47 U. S. 6 How. 44, 58 (12:337, 342); *Noonan* v. *Bradley*, 76 U. S. 9 Wall. 394 (19:757)."

Kansas similarly ruled in *National Bank of Topeka* v. *Mitchell*, 154 Kan. 276, emphatically citing *Brown* v. *Fletcher's Estate*, 210 M. D. 82-95, 52 L. Ed. 966, holding that the Kansas statute, Section 22-1308, R. S. Kan. 1923, 1935, did not vest authority in a Kansas court to render a judgment against a nonresident executor or administrator, notwithstanding said statute—on the same principle as a like statute was held void in *McMaster* v. *Gould*, 240 N. Y. 379.

Yet Commerce Trust Company claims that petitioner should not call this Court's attention to the void orders made by judges, which in and of themselves, together with Commerce Trust Company's acts pursuant to the conspiracy, deprived petitioner of her rights in said real estate, and personalty directly contrary of the command of Sections 41 and 42, Title 8, U. S. C., and the constitutional provisions alleged in the second amended complaint.

Jackson County Judges.

(1) Commerce Trust Company asserts that the application for injunction (R. 736-751) charges the Circuit Court of Jackson County, Missouri, with discrimination.

If so, the following prayer should have been granted (R. 751):

> "Wherefore appellant respectfully prays that this Court give effect to the law of the United States, which is supplemented by Sections 2283, 1651 and 451, Title 28, U. S. C., by issuing its writ of injunction in aid of the jurisdiction of this Court, and enjoining the further proceedings in said state court until the final decision of the above entitled cause on its merits."

For it appears that cause No. 339,134, filed October 25, 1930 (R. 292), has in violation of Section 10 of Article II of the Missouri Constitution of 1875, duplicated in Section 14 of Article I in the Missouri Constitution of 1945, ever since been kept on the docket and is now on said docket of said court.

Said failure to revive in Missouri, as shown by the opinions in *Merchants Mutual Ins. Co.* v. *Hill,* 17 Mo. App. 501, *Hartvedt* v. *Maurer,* 359 Mo. 16, *Zuckerman* v. *McCully,* 170 F. 2d 1015, l. c. 1018, has exactly the same legal effect as the failure to revive in this Court had in *Anderson* v. *Yungkau,* 329 U. S. 482. That is, the case is ended.

This is one of the questions presented to this Court, embodied in specification of error (17) on page 18 of petition for writ of certiorari.

As to the Circuit Court of Jackson County, Missouri, Commerce Trust Company states that (pp. 45-46):

> " • • • petitioner alleges that on four occasions between August 23, 1943, and December 20, 1949, the judges of the Circuit Court of Jackson County intentionally and purposefully discriminated against her."

If this be true, then the allegation accords with the re-

quirements of *Snowden* v. *Hughes,* 321 U. S. 1, and warrants reversal of the denial of injunction (R. 763, 767) to protect its own jurisdiction by the Court of Appeals.

V.

The judgment of the Supreme Court of Missouri in *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, was not on the merits, and is therefore not *res judicata* as to either party hereto.

Respondents assert that the judgment in *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, is *res judicata* of the issues herein. They have, however, not shown the court that all that the state court had decided, was that three petitions were held to be insufficient on ground of misjoinder of parties, and that, therefore, under a statute of that state, Sec. 948, R. S. Mo. 1939, the case must be dismissed. Such decision is not on the merits and authorizes the institution of a new suit or action in the State or Federal Court. Said statute is as follows:

> "If a third petition, answer or reply be filed and adjudged insufficient as above, or the whole or some part thereof be stricken out, the party filing such pleading shall pay treble costs; and no further petition, answer or reply shall be filed, but judgment shall be rendered. R. S. 1929, sec. 796; * * * 1889, sec. 2068."

In *Gordon* v. *Burris,* 125 Mo. 39, construing said Section 948, it is said, l. c. 41-42:

> "Section 2068, Revised Statutes, 1889, provides: 'If a third petition * * * be filed and adjudged insufficient as above, or the whole or some part thereof be stricken out, the party filing such pleading shall pay treble costs; and no further petition * * * shall be filed, but judgment shall be rendered.'

This section was passed on in *Beardslee* v. *Morgner,* 73 Mo. 22, and its provisions held it to be *mandatory,* leaving no discretion to be exercised by the trial court.

That section contains *no exceptions whatever* in regard to contests over *wills.* It applies to every variety of civil action where pleadings in usual form are filed in the Circuit Court.

As the party in default because of having filed *three* defective pleadings is required to pay treble costs, it is to be presumed that judgment is to be rendered for such costs. But there is no intimation in the section that a judgment is to be rendered on the *merits,* or that such judgment shall be a *bar* to any future proceedings involving the same facts.

Nor is there any intimation in the section under discussion that any evidence can be heard after the disposition of the third defective petition. At that point the section says: '*But judgment shall be rendered.' What* judgment? Evidently a judgment for treble costs, for that is all the section allows or alludes to."

In *State ex rel.* v. *McQuillen,* 246 Mo. 674, l. c. 690, following *Gordon* v. *Burris* the court *en banc* pointed out:

"• • • that the provision that judgment should be rendered when a third petition is adjudged insufficient, means a judgment for costs. The court says: 'But there is no intimation in the section that a judgment is to be rendered on the merits, or that such judgment should be a bar to any further proceedings involving the same facts.' "

The first paragraph of the opinion in *Moffett* v. *Commerce Trust Co.,* 354 Mo. 1098, reads, l. c. 1124:

"On December 30, 1944, Judge Ridge, Presiding Judge and Judge of Division Six of the Circuit Court of Jackson County, sustained separate demurrers

filed by the various defendants to plaintiff's fifth amended petition on the ground of misjoinder of parties plaintiff and, finding that a third petition of plaintiffs' had been found insufficient on said ground, dismissed the petition and rendered judgrent against plaintiffs for treble costs under Section 948, Revised Statutes Missouri 1939 (Mo. R. S. A.) From that judgment plaintiffs have appealed."

Paragraph 52 of the complaint (R. 29-30) alleges:

"• • • On Saturday, December 30, 1944, said state action was dismissed by said Circuit Court on the ground of misjoinder of parties plaintiff. On appeal to the Supreme Court of Missouri said judgment was affirmed."

Paragraph 53 of the complaint (R. 30-31) alleges:

"The dismissal of said cause on December 30, 1944, and at the November term of said court, was not on the merits, and the laws of the State authorized the reinstitution of said action."

Plaintiff (petitioner here) by appealing to this Court asserted that federal questions were involved in said decision, but this Court in its opinion in 329 U. S. 669, stated:

"The motion to dismiss is granted, and the appeal is dismissed for the reason that the decision of the state court sought here to be reviewed was based upon a nonfederal ground adequate to support it."

If there were federal questions involved in said decision in the Supreme Court of Missouri, then, under the rule stated in *Angel* v. *Bullington*, 330 U. S. 183, its finding discloses the contrary.

So that, the reasons given in *Angel* v. *Bullington* for preventing a new suit in the Federal Court after the Supreme Court of the State had affirmed a judgment, do not apply here.

And, in any event, the law of Missouri as stated in *Gordon* v. *Burris, supra,* prevents respondents from successfully claiming that such decision is, or could be, *res judicata,* because it was not on the merits. And, under the law of the State, as petitioner was entitled to file a new suit in the state court, she was likewise entitled to file a new suit in the Federal Court. This is upon the assumption that a Civil Rights case, based on the Acts of Congress, may be brought in the state court and in any Federal Court.

But the claim is that the dismissal of the appeal renders the decision *res judicata* of the issues in this case.

Respondents also claim that the orders of this Court denying certiorari are *jes judicata,* notwithstanding they rely upon the opinion of this Court in *Maryland* v. *Baltimore Radio Show,* 338 U. S. 1, expressly holding to the contrary.

Section 948, R. S. Mo., 1939, was applied by the Missouri courts in the above entitled case, and the forgoing decisions construing said Missouri statute and applying the Missouri law is controlling in this case by virtue of Section 1652, Title 28, U. S. C., which is as follows:

> "Sec. 1652. State laws as rules of decision. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

VI.

The acts of state judges alleged to be conspirators in the complaint, in addition to depriving petitioner of her property, also denied to her the equal protection of the laws.

The legal effect of said acts of said judges is well stated in *Yick Wo* v. *Hopkins,* 118 U. S. 356, l. c. 373-374:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The property protected by the XIVth Amendment includes not only the thing owned, but the right to acquire, use and dispose of it (*Buchanan* v. *Warley,* 245 U. S. 60).

VII.

The void judgments and orders alleged in the complaint, and claimed to be *res judicata* in respondents' briefs, were the means by which Missouri, Kansas and Oklahoma, through the conspirators, violated petitioner's federal rights and caused the damage sustained and created the cause of action alleged.

Conspirators who, through groundless actions (R. 9-14), deprive another of his or her property rights, secured by a Federal statute, subjects the conspirators to civil and criminal liability.

In *Nixon* v. *United States,* 289 Fed. 177 (C. A. 9), the Court cited and quoted *Waddell* v. *United States,* 112 U. S. 76, pointing out that an indictment wherein the overt acts alone consisted of groundless and fictitious

suits, to deprive a homesteader of his homestead, warranted the conviction of defendants. Syllabus 6 shortly states the gist of the opinion:

> "In a prosecution for conspiracy to injure a homestead entryman in the exercise of his rights, evidence that defendants, claiming as purchasers at a foreclosure sale of a mortgage executed by the homestead claimant before final proof did everything in their power, even to the point of ousting him from possession, to prevent him from consummating his entry by final proof, *and that they resorted to legal proceedings, and procured several writs of assistance, and forced the homestead entryman to defend his possession in various courts,* held sufficient to warrant their conviction under Criminal Code Sec. 19." (Now Section 241, Title 18, U. S. C.) Certiorari denied, 263 U. S. 703.

The state court groundless actions there involved appears in the opinions in *Williams* v. *Sherman,* 212 Pac. 971, 205 Pac. 259, 199 Pac. 646.

Since the litigation there involved, which consisted of only 3 groundless and fictitious actions, when alleged in an indictment, were sufficient to constitute a cause of action in a criminal case, it would seem that the allegations in the dismissed complaint did state a cause of action in a civil case against these respondents.

Williams v. *Sherman,* 212 Pac. 271, referred to as one of the groundless legal proceedings the institution of which sustained the conviction of the defendants in that case, points out that the judgments obtained in those courts were void, just as were the judgments and orders obtained by Commerce Trust Company and Mrs. Weede in the Kansas and Missouri Courts. Said the court:

> "Where courts are without jurisdiction of the sub-

ject matter to act, their proceedings are absolutely void. They constitute no justification and all concerned in them are trespassers. *Elliott* v. *Peirsol,* 1 Pet. 328; *Lessee of Hickey* v. *Stewart,* 3 How. 750; 1 Black on Judgments, 2d Ed., sec. 218; *Ex parte Gardner,* 22 Nev. 280, 3 Pac. 570; 7 R. C. L. 1042 * * * if want of jurisdiction goes to the subject matter of the action, it cannot be waived, and, the judgment being void, it is the duty of the court to recognize its want of jurisdiction over the subject matter even when no objection is made, and to decline taking further action whenever such want of jurisdiction is made to appear." Freeman on Judgments, 120.

"* * * because jurisdiction over the subject matter of the action can never be waived, and cannot be acquired by consent, there are numerous authorities which hold that want of jurisdiction over the subject matter may be shown by evidence dehors the record, 15 C. J. 832, sec. 149 * * * *Dow* v. *Johnson,* 100 U. S. 158; *O'Ferguson* v. *Crawford,* 70 N. Y. 253."

In *Roberts* v. *United States,* 283 Fed. 960 (C. A. 8), it is said:

"Indictments under penal code 19 for conspiracy to injure persons in the exercise of civil rights which charged that defendants conspired to prevent persons named from acquiring title to land under the Homestead Law, by *instigating fictitious contests and by interfering with the occupation and improvement of the land as set out,* held sufficient."

Cited in annotation to *Screws* v. *United States,* 162 A. L. R. 1330, l. c. 1395.

Said Nixon and Roberts convictions were based on the law declared by this Court in *Waddell* v. *United States,* 112 U. S. 76, approved by this Court in *Williams* v.

United States, No. 26, October Term 1950, 341 U. S. Preliminary Print, p. 80.

Section 42, Title 8, U. S. C., as absolutely vested the rights of petitioner and her testator as citizens of the United States, as the homestead law vested their property rights in homesteaders.

Said Section 42, Title 8, U. S. C., *Oyama* v. *California,* 332 U. S. 633; *Hurd* v. *Hodge,* 334 U. S. 24; *Williams* v. *United States,* No. 26, *supra;* and *Shelley* v. *Kraemer,* 334 U. S. 1, are discussed in petitioner's supporting brief on pages 24 to 29.

Since petitioner's property rights were guaranteed by Section 42, Title 8, U. S. C., and by the XIVth Amendment in which it is embodied and Clause 1, Section 2, Art. IV of the Federal Constitution, then, even had the courts had jurisdiction of the subject matter, yet their judgments were void under the law as declared by this Court in *The Lessee of Hickey et al.* v. *Stewart et al.,* 3 How. 750, l. c. 763, where it is said:

> "From the view we have taken of the whole subject, it is our opinion the decree of the Supreme Court of Mississippi would have been no bar to the action of the plaintiffs in this case, if the subject matter of the suit had been within its jurisdiction. But we are of the opinion that court had no jurisdiction of the subject matter, and that the whole proceeding is a nullity."

The decision of the Court of Appeals conflicts with the decision of this Court in *Fairweather* v. *Ritch,* 195 U. S. 276, where this Court held that giving effect to state court judgments, if due process was denied in the state courts, gave this Court jurisdiction to grant relief. This Court said, l. c. 299:

"Although these plaintiffs were parties to the proceedings in the state courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights,—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified,—a case is presented coming directly within the decision in 166 U. S. 226, 41 L. ed. 979, 17 Sup Ct. Rep. 581. Giving effect in the circuit court to the state judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully obtained, and adding it upon no new facts."

VIII.

The Acts of Congress, insofar as they purport to empower this Court to make the exceptions and regulations which the last sentence of paragraph 2 of Section 2 of Article III of the Constitution empowered Congress to make, are void because of conflict between the Constitution and said Acts.

The words in Section 2 of Article III of the Constitution providing

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the *Congress* shall make"

could not be changed by Section 1254 (1), Title 28, U. S. C., nor by the Acts of February 13, 1925 (43 Stat. at Large 936), or March 3, 1891 (Ch. 517, 26 Stat. 826, 828), to read

> In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Facts, with such Exceptions, and under such Regulations as the *Supreme Court* shall make.

Rule 38 (5) is based on said void acts. It is:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered."

By said rule, and said void acts of Congress, the above quoted provision of the Constitution has been made to read:

> In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the *Supreme Court in its discretion* shall make.

The 5 italicized words in said last quotation compel recital of Chief Justice Coke's prayer:

> "God send me never to live under the law of convenience or *discretion.*" (2 Rushworth's Collections 4.)

In *Yick Wo* v. *Hopkins,* 118 U. S. 346, at l. c. 370, it is held that no fundamental right of any human being can be at the mercy or discretion of any man or tribunal. Thus:

> "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of

> the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' *For, the very idea that one man be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.*" (Italics ours.)

The principle so expressed in Coke's prayer, and in *Yick Wo* v. *Hopkins,* as to judicial discretion, is expressed in *Cary* v. *Curtis,* 3 Howard 236, l. c. 245, thus:

> "Second, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the *judicial* over the legislative branch of the government, *and to give the former powers limited by its own discretion merely.*" (Italics ours.)

Justice Iredell, in *Chisholm, Ex'r,* v. *Georgia,* delivered a dissenting opinion. In *Williams* v. *United States,* 289 U. S. 553, and in many other cases, this Court has approved the luminous dissenting opinion of that great Justice, wherein he discussed the effect of an act of Congress as to judicial power exceeding legislative authority. Thus, l. c. 433:

> "Upon this authority there is, that I know, but one limit; that is, 'that they shall not exceed their authority.' If they do, I have no hesitation to say, that any act to that effect would be utterly void, because it would be inconsistent with the constitution, which is a fundamental law paramount to all others, which we are not only bound to consult, but sworn to observe; and, therefore, where there is an interference, being superior in obligation to the other, we must unquestionably obey that in preference."

And so the Acts of Congress of March 3, 1891 (Ch. 517, 26 Stat. 826, 828), and of February 13, 1925 (43 Stat. at Large 936), and Section 1254, Title 28, U. S. C., attempting, in violation of the Constitution, to vest discretion in this Court to make exceptions to the appellate jurisdiction vested in it by said provision of the Constitution—if they could be held to mean what respondents contend—then, as to the discretionary feature thereof, if any, are in direct conflict with said constitutional provision, and necessarily and absolutely void as to said feature of said statutes, which must be ignored and the valid feature given effect in accordance with the provisions of 62 Stat. 991, adopted June 25, 1948:

> "If any part of Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby."

Congress could not delegate the power vested in it by the words in the last sentence of Clause 2 of Section 2 of Article III

> " • • • with such exceptions, and under such regulations as the Congress shall make"

by the statutes authorizing review on certiorari to this

Court to make the exceptions to the appellate jurisdiction vested in this Court by the Constitution, because said exceptions could only be made by Congress.

The distinction between obligatory jurisdiction and discretionary jurisdiction is equivalent to the distinction between that which is, and that which is not. That is to say, this Court has obligatory appellate jurisdiction of this case which is conferred upon it by the Constitution and the statute authorizing petitioner to bring the case here. But, since discretionary appellate jurisdiction does not exist in this Court—nor did Congress have power to give it to this Court—then that discretionary feature of the statute must be held invalid, or not to include such discretionary feature, under the rule illustrated by statements of this Court.

In *The Abby Dodge* v. *United States*, 223 U. S. 166, it is said, l. c. 175:

> "In view of the clear distinction between state and national power on the subject, long settled at the time the act was passed, and the rule of construction just stated, we are of opinion that its provisions must be construed as alone applicable to the subject within the authority of Congress to regulate, and, therefore, be held not to embrace that which was not within such power."

The rule stated in *Dorchy* v. *Kansas*, 264 U. S. l. c. 289-290, applies:

> "A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand, if separable from the bad. *Berea College* v. *Kentucky*, 211 U. S. 45, 54-56, 53 L. ed. 81, 85, 86, 29 Sup. Ct. Rep. 33; *Carey* v. *South Dakota*, 250 U. S. 118, 121, 63 L. ed. 886, 888, 39 Sup. Ct. Rep. 403."

That Congress intended this construction is established by its enactment of the provision with reference to this very Section 1254, Title 28, U. S. C., for, enacted with it and with reference to it, and effective at the same time, Congress also enacted the statute (62 Stat. 991) above quoted.

The intention of the Congress in enacting said statutes could not have been to directly violate the Constitution, or to authorize this Court to do so, but it was to enable this Court to exercise the appellate jurisdiction vested in it by the Constitutioon, in this case and like cases.

It also recognized that some provisions in the Act might be held void, and said statute conclusively established the intention of Congress, in such event, that this Court would hold that the Constitution and this feature of the statutes enabling this Court to exercise its appellate jurisdiction should govern.

In *Crowell* v. *Benson,* 285 U. S. 22-95, this Court, construing a similar statute, held that such a statute always evidences an intention of the Congress which must be given effect, saying, l. c. 63:

> "We think that this requirement clearly evidences the intention of the Congress not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged."

The suggestion is in Commerce Trust Company's brief pages 75-77, that because this question has never been raised, then the silence of "quiescent years" settles it. But this Court in *Fairbank* v. *United States,* 181 U. S. 283, settles this question against respondents.

This case could not be reviewed by appeal, but only by certiorari under the present acts of Congress. Said acts are void insofar as they undertake to vest discretionary power in this Court to except this case from the appellate jurisdiction of this Court, since the Constitution gives that power to Congress alone.

The only response respondents can make is that because said acts have never been questioned, then their validity is settled by "the verdict of quiescent years." In other words, that because this Court has obeyed said statutes, which it has never held valid, but which respondents assert this Court has applied, establishes their constitutionality.

This contention is answered by the opinion in *Fairbank* v. *United States,* 181 U. S. 283, where this Court, giving full effect as to the law, declared in *Marbury* v. *Madison,* 1 Cranch. 137, and *McCulloch* v. *Maryland,* 4 Wheat. 316, l. c. 289:

> "If the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed."

In said opinion the Court also discussed the question of contemporaneous construction, quoting Justice Mathews as follows, l. c. 310,

> "The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt."

and concluded by holding the Act of Congress invalid because of conflict with the Constitution.

The extent of the practical construction there involved, and the weight to be given to it, was well stated in the dissenting opinion of four of the Justices, as follows, l. c. 323:

> "Practically no weight has been given in the opinion just filed to the fact that the power now denied to Congress has been exercised since the organization of the government, without any suggestion or even intimation by a single jurist or statesman during all that period that the Constitution forbade its exercise. It is said that the question of power never was presented for judicial determination prior to the present case, and therefore this court is at liberty to determine the matter as if now for the first time presented."

Section 1254 has been in effect since September 1, 1948. The Act of 1925 was in effect since February 13, 1925. The Act of 1891 had been in effect since March 3, 1891, according to the article of Chief Justice Taft in 35 Yale Law Review, page 1.

And so, under the rule applied in *Fairbank* v. *United States, supra,* if 112 years be not sufficient to give validity to a void act of Congress, then certainly a lesser number, whether 3, or 25, or 60 cannot be sufficient.

Long years ago this Government was represented by the late Justice McReynolds as attorney general, who, on June 9, 1913, filed a motion to advance and place on the summary docket the case of *Weeks* v. *United States,* No. 976, October Term 1912 (232 U. S. 383). Later the case was submitted by Solicitor General Davis on the ground that the question involved was absolutely foreclosed by a prior decision of this Court in *Adams* v. *New York,* 192 U. S. 585. A question as to the Court's discretion was dis-

cussed, as it has been discussed herein, on pages 53-55 of the brief of that plaintiff in error, and decided against the Government in favor of Weeks.

The question there involved had never been theretofore decided by this Court, as the question here involved with reference to these void acts of Congress has never heretofore been decided by this Court.

The decision in that case, on the question of discretion, is authority against respondents herein on said issues.

Said discussion as to the discretion of this Court in Weeks' brief, pages 53-55, is substantially duplicated on pages 66-68 of petitioner's supporting brief. The distinguished gentlemen named above did not think that questioning the Court's right to affect the rights of the plaintiff in error in that case by its judicial discretion was any reflection on the Court or its members, as do respondents herein.

Had that case been limited to review on certiorari, in accordance with Rule 38, then, since there was no conflict between the judgment there and any particular ruling of this Court, or any court of appeals, or any state court, the case could never have been reviewed by this Court. And so the decision in said case, and its record, establishes that the acts of Congress as to review on certiorari hinder the progress of the law.

Cooley on Constitutional Limitations, 7th Ed., p. 163, states:

> "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign authority of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wis-

dom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

> "1. These are the bounds which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every Commonwealth, in all forms of government;
>
> First. They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.
>
> • • • • • •
>
> Fourthly. The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have. • • • Locke on Civil Government, Sec 142."

Said Acts of Congress and said Rule constitute a mere unauthorized mechanism for keeping this case out of court. Three Justices of this Court have stated (350 U. S., l. c. 227) that they constitute

> "• • • a mechanism for keeping cases out of this Court."

One of the Justices joining in the opinion found that it was unsatisfactory by the language:

> "Mr. Justice Jackson, being of the opinion that this is the better of the two unsatisfactory courses open to us, joins this opinion." (l. c. 238.)

The mechanism provided by the *Constitution* for keeping cases out of this Court consisted of the words

> "* * * with such Exceptions, and under such Regulations *as the Congress shall make.*"

Congress could not shirk its absolute legislative duty to make exceptions to the appellate jurisdiction of this Court by enacting said void statutes, nor thereby relieve itself from the burden of making such exceptions, nor thereby place same on this Court, for the specification of the department of the Government which should make the exceptions in the Constitution prevented any other, including this, from making the constitutionally designated exceptions. And this because said language of the Constitution vested in the Congress alone powers which are strictly and exclusively legislative.

In *Wayman* v. *Southard,* 10 Wheat. 1, Chief Justice Marshall said, l. c. 43-44:

> "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative."

The appellate jurisdiction so vested in this Court by the Constitution could not be thus taken away by the Congress. In *Stevenson* v. *Fain,* 195 U. S. 165, Justice Fuller said, l. c. 167:

> "The Supreme Court alone 'possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it' (*United States* v. *Hudson,* 7 Cranch. 32, 3 L. ed. 259)."

Congress could not delegate its own function to this Court to deprive this Court of the jurisdiction vested in

it by the Constitution. For the Constitution vested that power in Congress alone, and thereby denied it to this Court. So that the Acts aforesaid, purporting to authorize this Court to exercise its discretion to determine whether or not it should except this case from the appellate jurisdiction of this Court, were void.

As this case has been lawfully brought before this Court within the meaning of the phrase

> "* * * lawfully brought before it for review"

in Section 2106, Title 28, U. S. C., then it is not only empowered, but it is its constitutional duty, to take jurisdiction of this case by granting the writ prayed for, and reversing the erroneous judgments of the lower courts.

The Constitution did not confer any authority upon the Congress to enact the said void acts substituting this Court's discretion to make the exceptions to the appellate jurisdiction of this Court which the Constitution declared should be made by Congress, and by Congress only. And so the law as declared by Justice Miller in *United States* v. *Germaine,* 99 U. S. 508, l. c. 510, controls, viz.:

> "This Constitution is the supreme law of the land, and no Act of Congress is of any validity which does not rest on authority conferred by that instrument."

The last sentence of Paragraph 2 of Section 2, Article III of the Constitution vests the appellate jurisdiction of this Court, as to this case, in this Court. That appellate jurisdiction must be exercised, if the power of Congress applies,

> "* * * with such Exceptions, and under such Regulations as the Congress shall make."

Sections 1254, 2101 and 2106, Title 28, U. S. C., constitute the existing regulations under which this Court must

exercise said appellate jurisdiction. They do not constitute exceptions enacted by Congress to said appellate jurisdiction, but, according to the contentions of respondents, vest a jurisdiction in this Court to exercise its discretion to decide whether or not it (this Court) will except this case from said appellate jurisdiction.

As to said feature, if said Acts contain such a provision, then such provision is in direct conflict with the provision of the Constitution declaring that the exceptions must be made only by the Congress, and therefore not by this Court.

So this is a case to which both the Constitution and the statute apply. And if they are in conflict, then it is the function of this Court to so decide, and thereupon give effect to the Constitution and treat the law as of no force and effect. This under the rule stated by Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch. 137, l. c. 177-178, when he thus expounded the law:

> "If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of those conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

In *Williams* v. *United States,* 289 U. S. 553-581, this Court held an Act of Congress void because in conflict with the provisions of Article III of the Constitution

with reference to judicial power. One reason given was because, l. c. 580:

> "* it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency. Compare *Springer* v. *Philippine Islands,* 277 U. S. 189, 201, 202, 72 L. ed. 845, 849, 48 S. Ct. 480." (Italics the Court's.)

In whom was the power to except vested by the following language of the Constitution:

> "* with such exceptions, and under such regulations as the Congress shall make"?

Said language of the Constitution answers the question, and hence destroys what has been referred to as the certiorari jurisdiction of this Court, in its discretion, to except any case it pleases—even when this Court has constitutionally conferred appellate jurisdiction—from such so granted appellate jurisdiction.

In *Springer* v. *United States,* 277 U. S. 189, this Court held that an Act of the legislature, appointing a committee thereof to enforce statutes it enacted, was void because the organic law vested that power in the Governor. Said the Court, l. c. 201-202:

> "It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legisla-

tive power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule."

Congress cannot "bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." (*Den ex. dem. Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284, 15 L. Ed. 372; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 475, 14 St. Ct. 1125, 38 L. Ed. 1047).

The words in the Constitution that the Supreme Court shall have appellate jurisdiction

> "* with such Exceptions, and under such Regulations as the Congress shall make"

expressly declare that the power thus vested in Congress is not a subject for judicial determination, and therefore could not be delegated to this Court by the acts of Congress authorizing the issuance of writs of certiorari.

This Court states that denial of certiorari is not a judicial determination for the simple reason that in denying the appellate jurisdiction of this Court, within the meaning of the Constitution, the Court does not function.

IX.

This Court, in hitherto obeying said Acts of Congress, has merely followed the command of the Constitution as invariably interpreted and construed by this Court—that it has no power to veto Acts of Congress and must obey void Acts of Congress until their validity is properly questioned.

This Court has no veto power on legislation enacted by Congress, and its right to declare an Act of Congress un-

constitutional can only be exercised when a proper case between opposing parties, raising such question, is submitted for determination.

That the petitioner has now properly raised this question is admitted by respondents in Commerce Trust Company's brief on pages 75-77, inclusive, adopted by the other respondents.

That this question has never been determined heretofore is admitted by respondents' statement of the fact that, notwithstanding they state

> "We have made much research on account of this startling contention,"

yet they have failed to produce a single authority showing that this Court ever decided the particular question here involved.

Respondents, without any foundation therefor, state in capital letters on page 76 of their brief:

> "* * * Petitioner is now contending that throughout the years your predecessors and yourselves have handled the applications for certiorari in a manner contrary to the provisions of the Constitution and without any right or jurisdiction so to do."

Whereas petitioner's contention is that this Court has merely enforced said Acts enacted by Congress, void as to their discretionary feature, never heretofore questioned, in accordance with the rule stated by the courts as follows:

In *Muskrat* v. *United States,* 219 U. S. 346, l. c. 357, 358, this Court pointed out that Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch. 137,

> "* * * was careful to point out that the right to declare an Act of Congress unconstitutional could

only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; * * *"

* * * * * * *

"The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the court was to follow and enforce the Constitution as the supreme law established by the people. And the court recognized, in *Marbury* v. *Madison* and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly before the courts for determination, for, said the Chief Justice in *Osborn* v. *Bank of the United States*, 9 Wheat. 819, 6 L. Ed. 223, speaking of the third article of the Constitution, conferring judicial power:

> 'This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States.'

* * * * * * *

But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although

> they show that there may be violations of the Constitution of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be 'a *case* in law or equity' arising under the Constitution, to which the judicial power does not extend."

The court there further said, l. c. 359:

> "'Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts."

Said Acts of Congress are void, not only because they place upon this Court, instead of Congress, the burden of making the exceptions to the appellate jurisdiction which the Constitution placed upon Congress, but said Acts are also void because no legislature can lawfully transfer to the judiciary the power to exercise a discretion to determine whether or not power embodied in a Constitution or statute shall be given operative effect in any action logically within its legitimate scope and intendment. Whether the law shall, or shall not, go into effect in particular cases can be determined only by Congress and not by this Court (*Sutherland* v. *Miller*, 79 W. Va. 796, 91 S. E. 993, L. R. A. 1917D, 1040; *Minn. St. P. & S. Ry. Co.* v. *Railroad Com'r*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. N. S. 821.

In *Massachusetts* v. *Mellon*, 262 U. S. 447, l. c. 488, this Court recently restated the same rule, thus:

> "We have no power *per se* to review and annul Acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act."

The rule that this Court, and all others, are without constitutional authority to exercise a veto power over the Acts of Congress or the legislature is a universal principle, well illustrated by the opinion in *State ex rel. Field* v. *Smith*, 329 Mo. 1019.

The proceeding was by original mandamus to compel the appropriation of $1,442,425.00 as the cost of the police department of Kansas City. Said the opinion, l. c. 1024:

> "The return alleges the unconstitutionality of the statute."

The opinion then called attention to the fact that in neither of two preceding cases, l. c. 1026:

> "• • • was the constitutional question now presented either raised or considered. With reference to the particular statute here involved the question of the delegation of legislative power is one of first impression."

In holding the statute void the court said, l. c. 1026-1027:

> " 'One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it

must remain; and by the constitutional agency alone the laws may be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those in which alone the people have seen fit to confide the sovereign trust.' (1 Cooley on Cons. Limitations, 224.)"

"'The legislature may not delegate the power to *enact a law,* or to *declare what the law shall be,* or to exercise an unrestricted *discretion* in applying a law.'" (Italics ours.)

At l. c. 1032 the court said:

"In the Beach case the constitutionality of the statute was in no respect challenged. Only its construction was in question. The court held in effect that what is now said Section 7524 did prescribe *some limitations,* but that said Section 7535 encompassed its grant of power with boundaries that were all but intangible. When the case was under submission here, some of us were then of the opinion that the statute was unconstitutional in that it attempted to delegate the power to tax, but that question could not be raised by the court, *ex mero motu,* in a case of that nature."

The Beach case so referred to is 325 Mo. 175.

On page 77 of said Commerce Trust Company's brief respondents say of petitioner's contention as to the invalidity of said Acts of Congress:

"We doubt if petitioner's counsel realizes that this contention in effect says that your illustrious predecessors and the present members of your Court, all learned and able lawyers of outstanding national reputation, have throughout the years in the han-

> dling of writs of certiorari *violated the very provisions of the Federal Constitution.*" (Emphasis Commerce Trust Company's.)

At l. c. 177 of 325 Mo. (the Beach case report) it appears that the counsel above mentioned by respondents was there of counsel for the state. So that the physical facts show that said counsel was familiar with the law which has prevented this Court from heretofore holding that said Acts of Congress were void, and hence could not, and did not, make the contention attributed to petitioner in said quotation.

Petitioner's contention merely is that Congress enacted void laws, which it was the obligation of this Court to enforce until their validity was properly questioned, which respondents admit are now properly questioned by petitioner. See pages 2, 14 and 25 of said petition for certiorari.

It has ever been the rule of every civilization worthy of the name that its courts cannot be permitted to exercise their discretion as to whether they should, or should not, apply the applicable law. The only civilizations which recognized the contrary rule, for which respondents contend, were those which did not have proper tribunals, and which did not have a "legal professional class" to raise the questions, as shown by the following:

> "It has been stated before that the failure of Greek law was in its inability to discover a tribunal competent to expand, administer, and apply the private law among even its own citizens. This failure arose both from the popular nature of the tribunals and from the want of a legal professional class. It remained in the evolution of law for the Roman to develop this competent tribunal and a powerful profession. The result was that among the Romans there was a rule of law. Among them it was not possible to have a con-

dition where the tribunal openly avowed that it would apply to a controversy the unquestioned law applicable, *only when it seemed proper to apply it.*"

(The Story of Law, John M. Zane, pages 197-198.)

X.

The appellate jurisdiction of this Court is and always has been obligatory and never discretionary, and failure to take jurisdiction of this case would be treason to the Constitution.

In *Bank of the United States* v. *Deveaux et al.*, 5 Cranch. 61, Chief Justice Marshall said, l. c. 87:

> "The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The Constitution, therefore, and the law, are to be expounded without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws."

The same Chief Justice in *Cohens* v. *Virginia*, 6 Wheat. 265, said, l. c. 404:

> "We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution.
>
> • • • • • • •
>
> "• • • we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

Under the authority of this Court (*Durousseau* v. *United States*, 6 Cranch. 307, and *Marbury* v. *Madison*, 1 Cranch. 137) the right even of a slave to the protection of the

Constitution of the government under which he lived was stated to be an absolute right, as shown in *Jim, a Slave,* v. *The State,* 3 Mo. 147, l. c. 149:

> "And whenever a case of appellate jurisdiction arises, and the authority of this court is invoked, the court is bound to exert it, it cannot decline the jurisdiction. It is the constitutional right of every subject of the laws of this State to claim its exercise. Such is the view taken by the Supreme Court of the United States, of the power of that tribunal under the Federal Constitution, which in this particular is similar to our own. *Durousseau* v. *The United States,* 2 Pet. Cond. R. 382; *Marbury* v. *Madison,* 1 Pet. Cond. R. 283; * * *"

The Constitution became effective March 4, 1789 (*Owens* v. *Speed,* 5 Wheat. 420). The provisions of said Constitution here invoked have been operating ever since, without any change or amendment.

So that the provisions of Article III of the Constitution and all of them, have the same force, meaning and effect now as they did at the time that the Constitution was adopted and went into effect.

This Court has thus stated the law in *South Carolina* v. *United States,* 199 U. S. 437-472, l. c. 488, 499, 450:

> "Two propositions in our constitutional jurisprudence are no longer debatable. One is that the national government is one of enumerated powers; and the other, that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself.
>
> The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its

grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those things were understood when made, are still within them; and those things not within them remain still excluded. * * *

'It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of the framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'

* * * * * * *

Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 188, 8 L. Ed. 23, 68, well declared:

> 'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said.' "

The appellate jurisdiction vested in this Court by the last sentence of the second paragraph of Section 2 of Article III of the Constitution, at the time of its adoption and until March 3, 1891—for a period of 102 years—was obligatory and never discretionary; and Congress never

attempted, before March 3, 1891, to give this Court discretion to decline to review cases of which it had jurisdiction. This fact is established by the statement of Chief Justice Taft in 35 Yale Law Journal of November, 1925, page 1, when he said:

> "In the Act of 1891, Congress for *the first time conferred upon the Supreme Court,* in extensive classes of litigation, *discretion* to decline to review cases if they did not seem to the Court to be worthy of further review."
>
> * * * * * * *
>
> "At the centenary celebration of the launching of the Federal Constitution in Philadelphia"

the Congress was asked

> "* * * to relieve the court, which was then considerably more than three years behind."
>
> * * * * * * *
>
> "* * * the bill was not fully and satisfactorily formulated until the last session of the first Congress of the Harding administration."

The report of the Subcommittee of the Judiciary Committee of the United States Senate of April 7 and 8, which held hearings with reference to the Act of February 13, 1925, contains the following statement:

> "We proceed to indicate just what this bill does so far as the appellate jurisdiction of the Supreme Court is concerned. It removes all obligatory jurisdiction over the judgments and decrees to the Circuit Court of Appeals."

All the decisions of this Court from the beginning, and all other courts commenting on said decisions, recognized that the only variety of jurisdiction vested in this Court

by the Constitution was obligatory. This is established by the following authorities:

The same author (John M. Zane) who pointed out that it was not possible for the Romans

> "* * * to have a condition where the tribunal openly avowed that it would apply to a controversy the unquestioned law applicable, only when it seemed proper to apply it"

in the year 1928, and three years after the discretionary jurisdiction became fully operative, and recognizing the danger incident thereto, said:

> "It is possible, of course, for Congress to abolish all the jurisdiction of the inferior courts of the United States, but it could not affect the original jurisdiction *nor by the best opinion could it prevent the appellate jurisdiction of the Supreme Court from taking effect upon any case within the judicial power of the United States.* If this appellate jurisdiction could be abolished, the Supreme Court could be cut down to simply its original jurisdiction. This would in effect leave the Supreme Court without authority to pass upon any constitutional question arising under the Constitution of the United States.
> * * *
>
> Owing to the fact that the Court has not been entirely consistent in its rulings, it is impossible to say what the law is, but it does seem certain that Congress could not take away the appellate jurisdiction of the Supreme Court. Certainly the Convention never contemplated such a national suicide as being possible. That appellate jurisdiction is subject, of course, to such exceptions as Congress may by law have directed, but the Supreme Court will never make it possible for Congress to ruin the whole scheme of government." (Italics ours.) Pages 374, 375.

It is manifest that Mr. Zane, being the great philosopher and lawyer described in the introduction to "The Story of Law" by former Solicitor General Beck, was indulging in his gift of prophecy as to the decision of this Court in this case.

XI.

Notwithstanding this Court holds that denials of writs of certiorari do not decide the merits of any case, yet respondents claim that orders of this Court denying petitioner's applications for certiorari are *res judicata* of the issues herein.

In the Weede brief, page 30, under the heading "*Res Judicata*" said respondents say:

> "This is the fifth time that petitioner has carried the Moffett litigation complained of herein to the Supreme Court of the United States, and in each instance Your Honorable Court either denied or dismissed her petitions, to-wit:
>
> * * * Certiorari denied, 283 U. S. 826 * * *
> * * * Certiorari denied, 290 U. S. 602, 642
> * * * Certiorari denied, 298 U. S. 675
> * * * Appeal dismissed, 329 U. S. 669 * * *
> Rehearing denied, 329 U. S. 827 * * *

No mention is made in the quoted language, or on pages 30-31 of the Weede brief as to any decision being *res judicata* save and except those wherein this Court denied certiorari, and in one case where it dismissed an appeal on the ground that no Federal question was involved.

Thereafter Point II of the Weede brief, page 36, discusses a case in which no respondent here was involved, and has written the legend

> Certiorari denied, 298 U. S. 675.

Commerce Trust Company, on page 44 of its brief, states in a caption:

> "For the purpose of avoiding duplication and repetition, we hereby adopt that part of the brief of respondents Weede appearing in Point I of their Argument, under the caption entitled: *'Res Judicata.'* We also adopt their Point II."

Thus asserting that the orders of this Court denying certiorari are *res judicata.*

Commerce Trust Company has inserted a "Foreword" between pages 21 and 25. In its No. "2" on page 22 is the language:

> "Petition for Certiorari was docketed in this Court as case 'No. 181, October Term, 1933.' Cert. denied October 9, 1933 (290 U. S. 642). December 11, 1933, motion for leave to file petition for rehearing denied (290 U. S. 602). * * * "

In No. "3" on page 22 is the legend:

> "Certiorari docketed as case 'No. 918, October Term 1935.' Cert. denied May 18, 1936 (298 U. S. 675)."

In No. "5" on page 23:

> " * * * Appeal was docketed as case 'No. 318, October Term, 1945.' * * * October 14, 1946, this court granted motion of respondents to dismiss appeal and rendered its *per curiam* opinion reported in 329 U. S. 669. Same is also set forth in Exhibit 'I' to petitioner's complaint."

In No. "17" on pages 24-25:

> "This court denied certiorari on March 9, 1931 (283 U. S. 825; * * *)"

The brief for respondents Howard and Kopp, on page 11, states:

"• • • in the Supreme Court of the United States, a petition for certiorari, which petition was denied (290 U. S. 642)."

And on page 13 is the recital:

"Plaintiffs therein then filed a petition for certiorari in the Supreme Court of the United States which was denied, 298 U. S. 675."

On page 16 is the statement:

"Petitioners appealed to this court and the court dismissed the appeal because there were no Federal questions involved (329 U. S. 669)."

And then concludes on page 19:

"Right or wrong, the judgments and decisions assailed are final and binding on petitioner. This is conclusively shown by the authorities presented in the briefs of respondents Helen Weede and Orlin A. Weede and of respondent Commerce Trust Company in the instant case."

Thus adopting the *res judicata* contentions of the other respondents.

The orders heretofore denying certiorari to this petitioner were merely advisory opinions, advising the parties and all other courts and law book text writers, and all the world, that in its opinion petitioner was not entitled to any relief in this Court on her petition for certiorari.

Respondents, on pages 12 and 77 of Commerce Trust Company's brief, cite *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912-936, wherein, at l. c. 919, it is said:

"Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever

> regarding the Court's views on the merits of a case which it has declined to review. • • •''

In view of the fact that respondents rely on said authority in two parts of their briefs, and other parts represent to this Court that denials of certiorari as to this petitioner are *res judicata,* these respondents in effect state that this Court has itself, by its orders denying certiorari, denied to the petitioner the equal protection of the laws.

XII.

The 1948 revision of Title 28, U. S. C., has restored the obligatory constitutional appellate jurisdiction of this Court, both as to law and fact, in this case.

The dropping of the six words

> ''• • • or for any error in fact''

from Section 2105, Title 28, U. S. C., which had theretofore been in Section 1011, R. S. U. S., and in the Judiciary Act for 159 years (1789 to 1948), has operated to make the appellate jurisdiction vested in this Court by the Constitution operate upon all the issues of fact and law contained in the record. For the words of the Constitution are

> ''• • • shall have appellate jurisdiction, both as to law and fact.''

The dissenting opinion of Judge Holmes in *Sunray Oil Corporation* v. *Allbritton,* 188 F. 2d 751, discusses said question, l. c. 755:

> ''The statutory provision against reversals in jury cases for any error in fact remained on the books for 159 years; and, during that period the federal courts

lost the use of an ancient common law appellate power. This power, in our opinion, may be compared to an arm that has become atrophied; even legislation like Sec. 2106 cannot fully restore it; *only a decision of the Supreme Court can cure it completely.*" (Italics ours.)

In *Wiscart* v. *Dauchy,* 3 Dallas 321, l. c. 326-327, Justice Wilson well stated the law in his dissenting opinion, which is now applicable in full measure by reason of the repeal, after 159 years, of the Act of Congress then in force preventing reversal for any error of fact.

By the repeal of said six words, there is no Act of Congress now in force excepting this Court's appellate jurisdiction as to the facts in this case, but only the constitutional provision vesting appellate jurisdiction in this Court, both as to law and fact. And so the dissenting opinion of Mr. Justice Wilson as to the duty of this Court in a case where there was no Act of Congress excepting either law or fact from the appellate jurisdiction of this Court, necessarily states the law applicable to this case as follows:

"It is true, the act of Congress makes no provision on the subject; but, it is equally true, that the constitution (which we must suppose to be always in the view of the legislature) had previously declared that in certain enumerated cases * * * 'the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

"The appellate jurisdiction, therefore, flowed, as a consequence, from this source; nor had the legislature any occasion to do, what the constitution had already done. * * *

"This construction, upon the whole, presents itself to my mind, not only as the natural result of a candid and connected consideration of the constitution and

> the act of Congress, but as a position in our system of jurisprudence, essential to the security and the dignity of the United States."

The law as declared in said dissenting opinion of Justice Wilson became the law of the Court as declared in *Durousseau* v. *United States,* 6 Cranch. 307, l. c. 313-314, by Chief Justice Marshall, and followed by him in other cases.

The elimination of the phrase "or for any error in fact," by repeal, coupled with the regulations of the appellate jurisdiction of this Court as to this case, in Sections 1254, 2105 and 2106, Title 28, U. S. C., has restored the original appellate jurisdiction conferred on this Court by the Constitution. So that, since this case is lawfully brought before it, then—as to this case—its appellate jurisdiction is obligatory, both as to law and fact, and it has no discretion to decline its exercise.

The evil resulting from the effect of an order denying certiorari is well ilustrated in this case. For never, since this Court denied certiorari to petitioner as to said Harper County, Kansas, litigation (290 U. S. 542)—with one notable exception, *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751—has petitioner been able to obtain any relief in any court, State or Federal.

The Kansas Federal courts gave *res judicata* effect to the denial of certiorari by this Court as shown by the recitals in their opinions.

Respondents' brief in the Supreme Court of Missouri in *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, called attention to such denials, l. c. 1112, and Judge Clark of that court in that case refused to grant any relief to petitioner, asserting that she had had not only her "day in court," but her "months and years" (p. 1130)—which, of course, was the very subject matter of her complaint—

that respondents had unlawfully kept her in court through all those days and months and years—and is still unlawfully continuing to do so.

The District Court and Court of Appeals in this case both call attention to the denials of certiorari by this Court, and gave effect thereto either as *res judicata,* or *stare decisis,* in accordance with the contentions of respondents. We now find respondents in this Court making the same contentions—though they have never filed an answer in any case and yet undertake to have this Court find the incorrect facts stated in opinions and affidavits which they have offered in evidence to be true—contradicted as they are by petitioner's exhibits—and on which the District Court failed to grant a summary judgment as they requested.

And, in violation of the rule well stated in *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U. S. 185, they now seek to have this Court again deny petitioner any relief and urge consideration of the facts embodied in the matter outside the pleadings, filed by them under Rule 12 (b) (6), which were never ruled on by the District Court, and from whose order failing to rule on the facts they have prosecuted no appeal!

While this Court, times without number, has stated that it decides nothing when it denies an application for certiorari, yet the physical facts remain that in such case, as a practical matter, it has given an advisory opinion to the effect that, on the facts stated by a petitioner, the petitioner is not entitled, under the law, to relief, and practically affirms the decision of the lower court—even where it has jurisdiction to review it—no matter how erroneous.

Said void Acts of Congress have been construed by this Court—not by applying the ordinary rule to the effect that its decision on the petition for certiorari is con-

trolled by the majority of the Court, but by a minority consisting of four members and sometimes three—contrary to the rule well stated in Cooley's Constitutional Limitations, 7th Ed., pp. 138-139, as follows:

> "And as a court must act as an organized body of judges, and, where differences of opinion arise, they can only decide by majorities, it has been held that it would not be in the power of the legislature to provide that, in certain contingencies, the opinion of a minority of a court, vested with power by the Constitution, should prevail, so that the decision of the court in such cases should be rendered against the judgment of its members."

In *Hertz* v. *Woodman*, 218 U. S. 213-214, this Court applied the same principle above stated by Cooley on Constitutional Limitations, thus:

> "Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts."

The fact that when this Court is equally divided it has no power to render any decision, but that the decision of the lower court brought before this Court cannot be reversed, results from the failure of a majority of this Court to so decide. So that, this Court has thus applied the law as it has been stated in Cooley on Constitutional Limitations as above quoted.

It is apparent that the Acts of Congress, now questioned for the first time, have occasioned the rulings of this

Court in conflict with the above rule stated by Cooley in his Constitutional Limitations, and that said acts of Congress have resulted in this Court's decisions as to the grant or denial of petitions for certiorari, which decisions have established the law of this Nation to the effect that this Court, as to said grant or denial, is not governed or controlled by any law, but only by the votes of a minority of the judges who are members of this Court—thus and thereby changing the government from a government of laws to a government of men—and not only to a government of men, but to a government of men who are in the minority!

XIII.

The Acts of Congress authorizing this Court to exercise its discretion as to its appellate jurisdiction has converted this government from a government of laws and not of men to a government of men and not of laws.

In *Marbury* v. *Madison*, 1 Cranch. 137, Chief Justice Marshall said, l. c. 163:

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.
>
> If this obliquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case."

Said language was used in February, 1803. Its basis is the Massachusetts Bill of Rights, adopted in 1780, of which John Adams, a signer of the Declaration of Independence, was the chief architect, which provided:

> "XXX. In the government of this commonwealth, the legislative department shall never exercise the

executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

In *United States* v. *Dickson et al.*, 15 Pet. 141, at l. c. 162, Justice Story said:

> "But it is not to be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it by the Constitution the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it."

Rule 38 5 of this Court declaring that "A review on writ of certiorari is not a matter of right," interprets the Act of Congress first adopted in 1891 and made complete by the Act of February 13, 1925, and so said Acts of Congress changed the government of the United States from a government of laws into a government of men.

The Acts of Congress, and the Rule of this Court making such change, are therefore invalid.

The statement that "A review on writ of certiorari is not a matter of right" is in direct conflict with the law declared by this Court in *Marbury* v. *Madison, supra,* as to the right of a litigant in this Court. It is there said, l. c. 163:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

The Act of February 13, 1925, had been in operation for some 12 years when in response to popular uproar the President of the United States sought to relieve the Nation from the effects of the discretionary feature of said void Acts of Congress by a proposed bill contained in Senate Report 711, United States 75th Congress, first session.

On March 9, 1937, instead of blaming said Acts of Congress—and mistakenly blaming this Court—the President of the United States delivered an address in which he said:

> "We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men." Commager's Documents, 564, 565.

It was apparent that the bill proposed too much in view of the adverse report from the Committee on the Judiciary, wherein that senate committee subscribed to the doctrine that this is a government of laws and not of men by its condemnation of the bill in the following language:

> "Its ultimate operation would be to make this Government one of men rather than one of law, * * *" Commager's Documents, 571.

XIV.

The issue as to the invalidity of the Acts of Congress of March 3, 1891, February 13, 1925, and Section 1254, Title 28, U. S. C., and Rule 38 of this Court was duly raised in the petition for certiorari and supporting brief.

The petition for certiorari, page 2, invokes the jurisdiction of this Court under Section 2 of Article III, United States Constitution, and Sections 1254 (1), 2101 (c) and 2106, Title 28, U. S. C.

Question III (Pet., pp. 14-15) is:

"III"

> "This Court cannot lawfully refuse appellate jurisdiction vested in it by the Constitution and laws of the United States to enable it to perform its indispensable duty to take jurisdiction as to this case by granting the writ prayed for."

Point X (Pet., p. 25) also raises the question—not only as to the power of Congress to delegate the legislative power to this Court, but alleges and asserts that the Congress

> "• • • did not have power to delegate its legislative power to this Court, nor could Congress authorize this Court to exercise its discretion as to whether or not"

it will except this case from the appellate jurisdiction of this Court.

In *Balzac* v. *Porto Rico,* 258 U. S. 298, l. c. 304, the statutes questioned were nowhere mentioned in the record nor assignments of error. Said the Court, l. c. 304:

> "Those assignments did not mention the statutes whose validity was questioned, but merely averred

that the defendant had been denied his right as an American citizen under the 6th Amendment to the Constitution. While this is informal, we think that it is sufficient when the record discloses the real nature of the controversy, and the specification of the assignment leaves no doubt that it is directed to that controversy."

Rule 38, Par. 5 of this Court, based on said void Acts of Congress, in effect enacts a rule of substantive law, and is not a mere rule of procedure, and is therefore void.

In *Carter* v. *St. A. B. R. Co.*, 338 U. S. 430, l. c. 438, it is said that said rule governs

> "* * * this Court's discretion in granting a writ of certiorari."

Justices Sutherland and McReynolds, in the hearing before the Subcommittee of the Senate on the Judiciary, Vol. 236, page 56, in February, 1924, testified as follows:

> "The Chairman. There has been some discussion in the Judiciary Committee, with regard to the definition of the words 'practice and procedure.' What those words really embraced. Can you give us any suggestions with regard to the proper construction of the words 'practice and procedure'?
>
> "Mr. Justice Sutherland. Well, I don't know that I can give any precise definition. They apply, of course, wholly to the adjective law. They could not involve the making of any substantive law, because the Congress would be powerless to delegate such power to the courts. I should say it would be confined to making rules pointing out the way in which cases should be presented, and the way in which the court should discharge its duty in determining what the substantive law is. I don't know that I could state it any more accurately than that.

"Mr. Justice McReynolds. A method of determining and enforcing rights and liabilities which have been prescribed by law.

"Mr. Justice Sutherland. Yes; it would enable the courts to determine the 'how' but not the 'what' of the law."

In *Hudson* v. *Parker,* 156 U. S. 277, this Court said, l. c. 284:

"This court cannot, indeed, by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other courts of the United States, or of a justice or judge of either, under the Constitution and laws of the United States. *Poultney* v. *La Fayette,* 37 U. S. 12 Pet. 472 (9: 1161); *Myer* v. *Tupper,* 66 U. S. 1 Black, 522, 526 (17: 180, 182); *The Lottawanna,* 88 U. S. 21 Wall. 558, 576, 579 (22: 654, 662, 663). Nor has it assumed to do so."

XV.

If the acts of Congress above questioned lawfully vest discretionary power in this Court to deny jurisdiction in all the cases mentioned in Section 2 of Article III of the Constitution be valid, then Congress is empowered by the Constitution to destroy the Government.

In Zane's The Story of Law, pages 374-375, it is said:

"It is possible, of course, for Congress to abolish all the jurisdiction of the inferior courts of the United States, but it could not affect the original jurisdiction *nor by the best of opinion could it prevent the appellate jurisdiction of the Supreme Court from taking effect upon any case within the judicial power of the United States.* If this appellate jurisdiction could be abolished, the Supreme Court could be cut down to simply its original jurisdiction. This would in effect leave the Supreme Court *without authority to pass*

upon any constitutional question arising under the Constitution of the United States. It would be possible for Congress to attempt to leave all cases whatsoever to the decision of state courts, except those cases where a state is a party or where foreign representatives are involved; but the Supreme Court has decided that certain jurisdictions of the United States courts are exclusive of the state courts. Owing to the fact that the Court has not been entirely consistent in its rulings, it is impossible to say what the law is, but it does seem certain that Congress could not take away the appellate jurisdiction of the Supreme Court. *Certainly the Convention never contemplated such a national suicide as being possible.* That appellate jurisdiction is subject, of course, to such exceptions as Congress may by law have directed, but the Supreme Court will never make it possible for Congress to ruin the whole system of government."

Mr. Zane there points out that the "better opinion" is that this Court has jurisdiction of the first class of cases mentioned in Section 2 of Article III, and that it cannot be taken away by Congress. The "better opinion" to which he referred is reflected in the opinion of Mr. Justice Story in *Martin* v. *Hunter,* 1 Wheat. 304, At l. c. 305-306, it is said:

> "This was a writ of error to the Court of Appeals of the State of Virginia, founded upon the refusal of the court to obey the mandate of this court, requiring the judgment rendered in this same cause, at February Term, 1913, to be carried into due execution. The following is the judgment of the Court of Appeals, rendered on the mandate: 'The court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the Constitution of the United States *' "

The question presented by the record necessitated a complete re-study by this Court of the Constitution providing for its judicial power and appellate jurisdiction. So that, in its true sense, nothing said on that subject in *Martin* v. *Hunter's Lessee* is *obiter.*

The opinion there distinguishes between the first and second classes of cases extending the judicial power of the United States by Section 2 of Article III of the Constitution.

The distinction made results from the use of the word "all" as to the cases mentioned in the first class, and the dropping or excluding it as to the cases mentioned in the second class, specifically pointing out that the word "all" was inserted for a purpose as to the first class and *ex industria* omitted as to the second class. Thus showing that it was the intention of the Constitution to extend the judicial power of this Court to all those cases mentioned in the first class absolutely. And, by the omission of the word "all" from the second class, to confer power upon the Congress to except cases in the second class from the appellate jurisdiction of this Court. The opinion on this question is, l. c. 333-334-335-336:

> "In what cases (if any) is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the constitution, between which a distinction seems to be drawn. The first class includes cases arising under the constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is 'and that the judicial power shall extend to all cases'; but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is dropped seemingly *ex industria.* Here

the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, etc. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the *first class*, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to *all cases; and in the latter case to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.*

The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arriving under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. *It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety.* The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply

interested; it embraces also maritime torts, contracts, and offenses, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit (*sic*) the national sovereignty. The original or *appellate jurisdiction ought not,* therefore, *to be restrained,* but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend in all cases whatsoever.

A *different policy* might well be adopted in reference to the *second class of cases,* for although it might be fit that the judicial power should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively given, lest it should imply a right to take cognizance or original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognizance, either to enforce rights or to prevent wrongs; and as to the other cases of the *second class,* they might well be left to be exercised under the *exceptions* and *regulations* which *Congress* might, in their wisdom, choose to apply. It is also worthy of remark that Congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited except by the subject-matter; in the second, it is made materially to depend upon the value in controversy."

Said opinion thus calls attention to the fact that the Congress, in the Judiciary Act of 1789, construed the constitutional provisions referred to in the above quotation just as Justice Story did.

So that this Court is aided, as to the question here raised, by the great and weighty principle of contemporaneous construction of said provisions of the Con-

stitution by many members of the Convention who were then in the First Congress.

Not only is this Court aided by such contemporaneous construction, but it is also aided by the consideration that Chief Justice Marshall concurred in every word of Justice Story's opinion.

In Volume IV of Beveridge's Life of John Marshall, pages 144-145, it is stated that

> "'* an opinion was delivered by Story that aroused more contention and had greater effect on the American Nation than had all the decisions of the Supreme Court on international law up to that time. This was the opinion in the famous case of *Martin* v. *Hunter's Lessee*.
>
> It was Story's first exposition of Constitutional law and it closely resembles Marshall's best interpretations of the Constitution. So conspicuous is this fact that the bench and bar generally have adopted the view that the Chief Justice was, in effect, the spiritual author of this commanding judicial utterance. But Story had now been by Marshall's side on the Supreme Bench for four years and, in his ardent way, had become more strenuously Nationalist, at least in expression, than Marshall."

The footnote to the above statement reads:

> "Story wrote George Ticknor that Marshall 'concurred in every word of it.' (Story to Ticknor, Jan. 22, 1831, II, 49.)"

The Chief Justice in *Cohens* v. *Virginia*, 6 Wheat. 265, referred to the two classes of cases in Section 2 of Article II of the Constitution, which were the basis of Justice Story's opinion as above quoted in the following language, l. c. 378-379:

> "The second section of the third article of the constitution defines the extent of the judicial power of

> the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This clause extends the jurisdiction of the court to all the cases described, *without making in its terms any exception whatever,* and without any regard to the condition of the party. If there be any *exception, it is to be implied against the express words of the article.*
>
> In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' 'and between a state and foreign states, citizens or subjects.' ''

He also treats "cases" and "controversies" as having the same meaning.

At l. c. 405:

> "If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any *controversy* depending in a court, the cause should depend on the validity of such a law, that would be a *case* arising under the constitution, to which the judicial power of the United States would extend."

In discussing the cases in the first case he says, l. c. 378:

> "This clause extends the jurisdiction of the court to all the cases described, without making in its terms any *exception* whatever, and without any regard to the condition of the party. If there be any *exception*

> it is *to be implied against* the *express words* of the article."

To hold with respondents' contentions would necessitate the overruling of *Cohens* v. *Virginia* on this point because the phrase

> "In all the other cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make,"

read in connection with the above statement by the Chief Justice, demonstrates that the exceptions Congress is authorized to make, cannot be made as to any case in the first class because Congress would have to imply its authority to make it "against the express words of the article."

The terms of the clause extending the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, could not be said of the second class of cases under the name "controversies" referred to in Section 2 of Article III.

It follows that said construction by the Chief Justice of the first class of cases named in Section 2 excludes the power of Congress to except any case of said first class from the appellate jurisdiction imperatively vested in this Court by the Constitution.

The Chief Justice concludes his discussion of this question in *Cohen* v. *Virginia,* 6 Wheat. 304, by the following significant language at l. c. 423:

> "The question, then, must depend on the words themselves; and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was *fully discussed* and *exhausted* in the case of *Martin* v. *Hunter.*"

The words in Judge Story's opinion, l. c. 336:

> "* as to the other cases of the *second class*, they might well be left to be exercised under the *exceptions* and *regulations* which Congress might, in their wisdom, choose to apply,"

are physical facts showing a construction by Chief Justice Marshall, Justice Story and this entire Court in *Martin* v. *Hunter, of the words*

> "* with such exceptions, and under such regulations as the Congress shall make,"

applying same only to class 2 of cases described in Section 2 of Article III of the Constitution.

In *The Moses Taylor* v. *Hammons*, 4 Wall. 411-431, the court, l. c. 428, quoted Section 2 of Article III, and in support of its conclusion said, l. c. 428-429:

> "In the opinion delivered in the case of *Martin* v. *Hunter's Lessee*, 1 Wheat. 334, Mr. Justice Story comments upon the fact that there are two classes of cases enumerated in the clause cited between which a distinction is drawn; that the first class includes cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction; and that, with reference to this class, the expression is that the judicial power shall extend to all cases; but that in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is dropped. And the learned justice appears to have thought the variation in the language the result of some determinate reason, and suggests that, with respect to the first class, it may have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form, to all

cases, and, with respect to the latter class to leave it to Congress to qualify the jurisdiction in such manner as public policy might dictate. Many cogent reasons and various considerations of public policy are stated in support of this suggestion. The vital importance of all the cases enumerated in the first class to the national sovereignty is mentioned as a reason which may have warranted the distinction, and which would seem to require that they should be vested exclusively in the national courts, a consideration which does not apply, at least with equal force, to cases of the second class."

In *Stevenson* v. *Fain*, 195 U. S. 165, it is said, l. c. 167:

> "The use of the word 'controversies' as in contradistinction to the word 'cases,' and the omission of the word 'all' in respect of controversies, left it to Congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done."

In *United States* v. *Hudson*, 7 Cranch. 32, it is said, l. c. 33:

> "Of all the courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it."

In Clause 2 of Section 2 of Article III of the Constitution it is provided:

> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate

> Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

According to the construction contended for by respondents, said original jurisdiction conferred by said quoted first sentence is the only jurisdiction vested in this Court by the Constitution. That is to say, this Court, if said contention be correct, has no constitutional jurisdiction save and except in cases affecting ambassadors, other public ministers and consuls and those in which a State is a party.

Chief Justice Hughes, in his letter of March 22, 1937, to Senator Wheeler, said:

> "Our original jurisdiction is defined by the Constitution and embraces cases to which states are parties. There are not many of these. At the present time they number thirteen and are in various stages of progress to submission for determination."

If this Court has jurisdiction only of such cases, then the offices of all of these illustrious Justices would be sinecures, for which they would have no duty to perform from a constitutional standpoint.

And if Congress has the power to deprive this Court of appellate jurisdiction by excepting from said appellate jurisdiction all of the cases described in the first class in Section 2 of Article III, then it is patent that what the founding fathers did was not to create a government of three distinct departments equal in rank and power, but to create a government which put it in the power of one of the departments to destroy another by excepting all cases from its appellate jurisdiction.

There are many opinions, wherein the question was not fully considered, that Congress has such power. But the

statements of Mr. Zane in his Story of the Law, pages 374-375, show that in his opinion the *better opinion* was to the contrary, and that the Congress did not have such power, and that this Court would not permit it so to do.

In *Williams* v. *United States,* 289 U. S. 553-581, one of the questions involved was whether or not the judicial power extends to every case in which the United States is a party, as reflected in the opinion in *Minnesota* v. *Hitchcock,* 185 U. S. 384. In holding that an affirmative statement that it had was erroneous this Court said, l. c. 572:

> "This conception of the application of the judicial article of the Constitution, which at first glance seems plausible, will be found upon examination and consideration to be entirely fallacious.
>
> We first direct attention to the carefully chosen words of Section 2, Cl. 1, Art. 3. By that clause the judicial power is extended to *all* cases in law and equity arising under the Constitution, etc., to *all* cases affecting ambassadors, other public ministers and consuls; and to *all* cases of admiralty and maritime jurisdiction. Then the comprehensive word 'all' is dropped, and the enumeration continues in terms to apply to controversies (but not to 'all') to which the United States shall be a party; to controversies between two or more states, etc. The use of the word 'all' in some cases, and its omissions in others, cannot be regarded as accidental, under the rule stated in an early case, *Holmes* v. *Jennison,* 14 Pet. 540, 570, 571, 10 L. ed. 579, 594, 595, and ever since fully accepted, that, 'In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and

shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.' See also *Myers v. United States,* 272 U. S. 52, 151, 71 L. ed. 160, 180, 47 S. Ct. 21.

The significance of the use of the word 'all' in some instances and its omission in others is commented upon by Mr. Justice Story in *Martin* v. *Hunter,* 1 Wheat. 304, 333-336, 4 L. ed. 97, 104, 105, and it is there suggested that the word 'all,' which is used in the earlier part of Section 2 of the judicial article, was dropped in the latter *ex industria,* and that from this difference of phraseology, perhaps, a difference of constitutional intention may with propriety be inferred. See also 2 Story, Constitution, 4th ed. p. 458, sections 1674, *et seq.*"

"We are here immediately concerned only with that provision of Article 3 which extends the pudicial power to 'controversies to which the United States shall be a party.' Literally, this includes such controversies, whether the United States be party plaintiff or defendant; but in the light of the rule, then well settled and understood, that the sovereign power is immune from suit, the conclusion is inadmissible that the framers of the Constitution intended to include suits or actions brought against the United States. And here the omission to qualify 'controversies' by the word 'all', as in some other instances, becomes peculiarly suggestive."

* * * * * * *

The judicial clause also extends the judicial power (again omitting the word 'all') to controversies 'between a State and citizens of another State.' "

It thus appears that this Court, as recently as May 29, 1933, held that the absence of the word "all" from the second class of cases to which the judicial power was

extended by Section 2 of Article III of the Constitution, was a factor which necessitated the decision of this Court holding that the word "all" in the first class, and its absence in the second, prevented the extension of the judicial power to the case of the second class then before the Court—thus giving full effect to the construction placed by Justice Story and Chief Justice Marshall, and the other Judges of this Court, in *Martin* v. *Hunter*, 1 Wheat. 304, l. c. 333-336, of Article III of the Constitution.

The Constitutional Convention never contemplated that the Supreme Court of the United States would be required by said Acts of Congress to except from its appellate jurisdiction those cases which Congress alone was authorized to except therefrom by the provision in Clause 2, Section 2, Article III of the Constitution, "with such exceptions and under such regulations as the Congress shall make."

Many of its Chief Justices have called attention to the disastrous results of said Acts of Congress.

Chief Justice Taft, in *Magnum Co.* v. *Coty*, 262 U. S. 159, 163, on May 7, 1923 said, as to certiorari under the Act of 1891:

> "Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Chief Justice Hughes, on March 22, 1937, wrote to Senator Wheeler, as to certiorari under the Act of 1925:

> "The work of passing upon these applications for certiorari is laborious. *"

The said Chief Justice, after pointing out that more than 80 per cent were denied, stated:

> "The remainder, falling short, I believe, of 20 per cent show substantial grounds and are granted."

In 1949 Chief Justice Vinson said, as to certiorari under Section 1254, Title 28, U. S. C.:

> "During the past term of Court, only about 15 per cent of the petitions for certiorari were granted. •"

While this Court has ruled that its orders denying certiorari do not decide the merits of any case, yet said ruling, as a practical matter, only applies in this Court. For, as heretofore pointed out, the first denial of certiorari by this Court with reference to the Harper County, Kansas, litigation herein, has been treated by all the courts other than this as having either *res judicata* or *stare decisis* effect. This includes the lower courts which have passed on this case, as shown by their opinions (R. 769-784, Pro. 1-14).

In addition, the authors of textbooks, many of whom have been connected with the 1948 revision of the Judicial Code, call attention in their works to the fact that "certiorari was denied" in many cases to which they refer.

In this connection we invite attention to the recent work of Barron and Holtzoff entitled "Federal Practice and Procedure."

State and lower Federal Court opinions call attention to the fact that this Court denied certiorari whenever they are again asked to decide anything with reference to a case which has resulted in such denial. (See opinions on which respondents rely.) See Point XI hereof.

Thus disclosing that these orders denying certiorari are given *res judicata* or *stare decisis* effect by all the courts, excepting this, and by all legal text writers without exception, and giving such effect to orders of this Court

which this Court declares have no effect and thereby rendering the jurisprudence of this Nation unknown and uncertain—as recognized by this Court in *Darr* v. *Burford*, 339 U. S. 200, and in the cases mentioned in paragraph 2 of Point XII on page 56 of petitioner's supporting brief.

Of course, this result was occasioned by said void Acts of Congress, which this Court was required to observe and enforce, since this question, so far as known, was never heretofore raised by any litigant. And if it had been, of course the Court would have held said acts utterly void and of no effect.

As these certiorari statutes were operating when Mr. Zane made his contribution to the jurisprudence of the Nations, and Chief Justice Taft's statement in *Magnum* v. *Coty* had been theretofore delivered, evidently occasioned his statement that

> "Certainly the Convention never contemplated such a national suicide as being possible."

The function of this Court as outlined by Madison is well stated in Warren's The Supreme Court in United States History, pages 14-15, as follows:

> "And the Court's power to pass on the Constitutional validity of Federal legislation was established by decisions of the Court itself, as an inherent and necessary judicial function in ascertaining and interpreting what the finally binding law was. Yet as Madison said in 1832, a supremacy of the Constitution and laws of the Union 'without a supremacy in the exposition and execution of them would be as much a mockery as a scabbard put into the hands of a soldier without a sword in it. I have never been able to see that, without such a view on the subject, the Constitution itself could be the supreme law of the land: or that the uniformity of the Federal

> authority throughout the parties to it could be preserved; or that, without this uniformity, anarchy and disunion could be prevented.' "

Chief Justice Vinson on September 7, 1949, corroborated said statement by the following:

> "The debates in the Constitutional Convention made clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgments.' "

When the Constitution was adopted there were no Courts of Appeal, or decisions of this Court, as to which a decision of a lower court might be held in conflict.

So that, the Convention did not contemplate that Rule 38, or said Acts of Congress, would govern this Court in the exercise of its appellate jurisdiction.

The Act of April 13, 1925, was not approved by everyone, as shown in the Columbia Law Review, Vol. 25, page 393, 407, for April 1925:

> "Any one who has read the testimony given before a sub-committee of the Senate Judiciary Committee when the bill, recently enacted into law, was under discussion, will pick up the text of the statute with an optimism which he will soon discover to be unwarranted. * * *
>
> It may be said of the new act that it put a premium on the 'scarlet word'. Cf. Alfred Noyes, Some Aspects of Modern Poetry, pp. 128, 130."

No necessity or exigency of this Court, or of this Government or any of its departments, justified any disobedience of the command of the Constitution. Only by amendment can such exigency or necessity be provided for. It is unlawful to provide therefor by a void Act of

Congress. The rule was well stated in *Ex parte Milligan*, 4 Wall., l. c. 120-121:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of the provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence. *"

It is therefore respectfully submitted that the relief prayed in petitioner's petition for certiorari be granted.

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APPENDIX.

(Excerpts from complaint written in February, 1948, alleging conspiracy of a state fiduciary officer with two state judges and others, acting under color of law, resulting in deprivation to petitioner of the equal protection of the laws, due process and privileges and immunities—thus meeting the requirements ruled by this Court in June, 1951, as necessary for statement of a claim under Section 43, 47 (2) (3) on which relief can be granted, in *Collins* v. *Hardyman*, 341 U. S. 651-664, Preliminary Print, at l. c. 660).

Par. 1 (R. 3).

"This action is for damages caused by overt acts done and caused to be done pursuant to a conspiracy to which defendants were parties, and who *conspired* for the purpose of impeding, hindering, obstructing and defeating the due course of justice in the States of Missouri, Kansas and Oklahoma, *with intent to deny* Thomas S. Moffett and plaintiff, as citizens of the United States, the *equal protection of the laws*, and pursuant to which said Thomas S. Moffett and plaintiff were purposefully discriminated against by said States through their agents and thereby *deprived of the equal protection of the laws* * * *"

Par. 2 (R. 4).

"* * * Said order was made for the purpose of enabling Commerce Trust Company as an agent of the State of Missouri to prosecute fictitious claims for its benefit as executor of the estate of John Moffett against itself as the administrator of said partnership estates, and to institute and maintain said fictitious claims hereinafter mentioned, and thereby through intentional and purposeful discrimination against Thomas S. Moffett and plaintiff to *deprive* them of their property *without due process of law*, and *deny* to them *the equal protection of the laws* and *of all the rights guaranteed* by said XIVth Amendment."

Par. 3 (R. 4).

"• • • in connection with said order of said 'Special' judge, *deprived* Thomas S. Moffett of his property without due process of law, *and denied him the equal protection of the laws and his privileges and immunities* as a citizen of the United States, • • •"

Par. 7 (R. 6).

"• • • and thus Thomas S. Moffett and plaintiff were *denied* the *equal protection of the laws and the rights, privileges and immunities* guaranteed to them by Section 2 of Article IV, and by Section 1 of the XIVth Amendment of the United States Constitution."

Par. 17 (R. 13).

"• • • Said defendants have kept said fictitious actions pending for the purpose of attempting to coerce plaintiff into paying sums for which plaintiff was not liable, and to oppress her by preventing the final settlement of said estates; and, pursuant to said conspiracy, caused said circuit court to keep said unlawful action pending; and by such acts plaintiff has been intentionally and purposefully discriminated against, and has been *denied the equal protection of the laws* of the United States, Missouri, Kansas and Oklahoma, and prevented from enjoyment and possession of the small portion of the property of said Thomas S. Moffett's estate devised and bequeathed to her which defendants have not yet misappropriated."

Par. 18 (R. 13-14).

"Said suit for $441,957.71, • • • and have carefully maintained said fictitious suits on the dockets of said courts until the filing of this action, • • • and said defendants thus using State power, have caused said State, intentionally and purposefully, to discriminate against plaintiff, contrary to the rule applied to litigants in general, and *thereby denied to plaintiff the equal protection of the laws,* in violation of the XIVth Amendment."

Par. 32 (R. 18).

"About December 6, 1929 * * * Thomas S. Moffett was *deprived* of his farm of 1,127½ acres, and thereby *deprived* of having and exercising his right and privilege as a citizen of the United States of owning and possessing said property, Thomas S. Moffett appealed to the supreme court of Kansas seeking redress from said judgment. Notwithstanding the facts appeared in the record before the district judge and before said supreme court, said supreme court of Kansas affirmed said judgment. Said Kansas courts thereby intentionally and purposefully *denied T. S. Moffett the equal protection of the laws,* contrary to the XIVth Amendment to the Constitution of the United States. * * *"

Par. 37 (R. 20).

"Thomas S. Moffett died on December 22, 1930. The judge of said district court, without application by any party in interest but on application of Helen Weede, on February 14, 1931, made an order purporting to revive said abated partition suit, naming the ancillary administratrix of the estate of Thomas S. Moffett in Kansas as a party plaintiff, and this notwithstanding a suit of partition real estate could not, under the law of Kansas, be either brought, revived or prosecuted by the administratrix of T. S. Moffett's estate, or in the administratrix's name as plaintiff—thus and thereby, intentionally and purposefully, discriminating against plaintiff in favor of defendants, and *denying the equal protection of the laws to plaintiff* as the sole devisee of said Thomas S. Moffett, and the owner of 7/12ths interest in said lands, and the administratrix of the Moffett Brothers and T. S. Moffett estates in Kansas. * * * And, though without jurisdiction or authority so to do, said district judge intentionally and purposefully discriminating against plaintiff, made said entry of revivor against the said plaintiff in the said partition suit, thus *denying to her her privileges and immunities as a citizen of the United States,* and as a citizen of Missouri enjoyed by the residents and citizens of Kansas, and *thus denied her the equal protection of the laws.*"

Par. 38 (R. 20-21).

"Said district judge thereafter rendered a judgment for $143,829.96 against Commerce Trust Company as Missouri administrator of Moffett Brothers partnership estate, * * * thus giving effect to the unlawful acts of the defendants aforesaid in said court, and *denying* to Moffett Brothers partnership estate, and to plaintiff, the *equal protection of the laws,* and *due process of law,* and to plaintiff *her privileges and immunities as a citizen of the United States,* and the protection of the Constitution and laws of the United States. That said judge of said court, though without jurisdiction, power or authority so to do, and notwithstanding the administrators as surviving partners of the partnership estate of Moffett Brothers Cattle, Land and Lumber Company were not in the district court of Harper County, Kansas, in their official capacity, and were without possession of any property belonging to said partnership estate in Kansas, rendered a judgment against said administrators and survivors of said partnership estate for the sum of $101,228.06. And by said acts said district judge, intentionally and purposefully, *denied* to said plaintiff *the equal protection* of Section 1 of Article IV of the Constitution of the United States, and the act of Congress adopted to give effect to said constitutional provision * * * And this notwithstanding Section 60-310, Revised Statutes of Kansas 1923, provided that claims barred by the statutes of states in which nonresidents resided should also be barred in Kansas, *the equal protection of which statute was* also intentionally and purposefully *denied* by said Kansas district court, contrary to said XIVth Amendment, * * *"

Par. 42 (R. 23-24).

"* * * Said books constituted no basis for said Commerce Trust Company's Exhibit No. 8. So that, the State of Missouri and the State of Kansas, through their Moffett representatives and said judge, jointly, by the use of said false document and by their intentional, purposeful discrimination *deprived* plaintiff of her property *without*

due process of law, and *denied to her the equal protection of the laws,* in violation of the provisions of Section 1 of the XIVth Amendment to the United States Constitution."

Par. 47 (R. 26).

"Though the laws of Kansas and Missouri prohibited said Commerce Trust Company and said Howard from appearing in the Kansas courts in said conflicting capacities, yet said judges, intentionally and purposefully, authorized such appearance in said conflicting capacities, and thereby intentionally and purposefully discriminated in favor of Commerce Trust Company as executor *de bonis non* of the John Moffett estate, and *denied* to said Commerce Trust Company as alleged Missouri administrator of Moffett Brothers partnership estate—and by the same acts *denied* to plaintiff—the *equal protection of the laws* and the *other rights guaranteed* by Section 1 of the XIVth Amendment to the United States Constitution."

Par. 48 (R. 27).

"* * * Thereafter, under the compulsion of said order, defendants, by threats of litigation and receiverships, compelled said Thomas S. Moffett and plaintiff to execute a special warranty deed conveying said ranch to Commerce Trust Company individually, without consideration. Said 'Special' judge, in making said order under color of the statutes of Missouri, intentionally and purposefully discriminated against Thomas S. Moffett and in favor of said defendants, and *denied* to Thomas S. Moffett *the equal protection of the laws and the rights, privileges and immunities* guaranteed by the XIVth Amendment of the United States Constitution. * * * Said Commerce Trust Company, as an agent of the State of Missouri acting as executor of the John Moffett estate and administrator of said partnership, intentionally and purposefully *denied to plaintiff the equal protection of the laws* so guaranteed."

Par. 51 (R. 29).

"Said conspirators caused said Andrews, posing as administrator of Moffett Brothers and Andrews partnership estate in Kansas, when he was not, to appear in the probate court of Wyandotte County, Kansas, and to present a non-existing claim for $1,386.19 against the estate of Thomas S. Moffett. The judge of said court entered an order on June 16, 1941, directing that said sum be paid to said Andrews by said administratrix, who was compelled, as a condition precedent to an order discharging her as administratrix, to pay said sum to said Andrews. Thereby said sum was misappropriated and lost to said estate and to plaintiff, in direct violation of the *rights and protection guaranteed to plaintiff* by Section 1 of the XIVth Amendment."

Par. 52 (R. 29-30).

"After the discharge of the ancillary administratrix of the estate of Thomas S. Moffett on June 16, 1941, and after the transfer by her of all rights then existing in favor of said estate to plaintiff, plaintiff on August 22, 1941, instituted an action in the circuit court of Jackson County, Missouri, against defendants for the same damages caused by the same conspiracy and the same overt acts pursuant thereto, seeking the same relief sought in this action. On Saturday, December 30, 1944, said state action was dismissed by said circuit court on the ground of misjoinder of parties plaintiff. On appeal to the supreme court of Missouri said judgment was affirmed. Section 922, R. S. Mo. 1939, was the statute * * * which said statute excluded misjoinder of parties plaintiff as a ground of demurrer. The Missouri courts, * * * construed into said statute a provision which was not in it, namely, misjoinder of parties plaintiff as a ground of demurrer, contrary to the provision of Article III of the Constitution of Missouri of 1875 and Article II of the Constitution of Missouri of 1945, prohibiting the courts from exercising legislative power, thereby *denying* to plaintiff *the equal protection of the laws,* contrary to the guaranty

of the XIVth Amendment to the United States Constitution. Said acts by the Missouri courts were * * * caused to be done under color of the laws of the State. Whereas said acts were a *denial by the State* of the *equal protection* of said IIId and IId articles of said Constitutions, and a violation of *plaintiff's rights* under the *equal protection provision of the XIVth Amendment.* Notwithstanding the repeal of said Section 922 became effective on Monday, January 1, 1945, the supreme court of Missouri, in affirming the judgment of the circuit court on February 11, 1946, applied said non-existing statute and parts thereof which had not been applied by the circuit court, in support of its judgment of affirmance, thereby *denying* to plaintiff said *equal protection of the laws.* * * *"

Par. 54 (R. 31-32).

"Defendants, by threats of enforcing said void judgment for $101,228.06 mentioned in paragraph 38 hereof, and other unlawful inducements, caused a void deed by said Oklahoma administrator to be delivered to Commerce Trust Company as alleged Missouri administrator purporting to convey said Oklahoma lands * * * All of which acts were known by said defendants to be void and to have been done by said district judge and said administrators, and executor of the estate of John Moffett, as State officials exercising the powers of the State of Kansas and Missouri and Oklahoma, as acts done pursuant to said corrupt conspiracy. And this notwithstanding said defendants knew that said acts were unlawful acts in direct violation of the laws of the States of Kansas, Oklahoma and Missouri, and thus and thereby *deprived* plaintiff of her interest in said Oklahoma property, in violation of all the guaranties of Section 1 of the XIVth Amendment to the United States Constitution. By said acts said States, through said district judge and said executor and administrators, wilfully, intentionally and purposefully discriminated against plaintiff. Said acts *denied to plaintiff the application and benefit of the laws applicable to all other persons in general under the laws of said States and the United States.*"